The Central Law Journal.

ST. LOUIS, MARCH 11, 1892.

It is doubtful whether, in the long history of the United States Supreme Court, there has been rendered on a single day, a more important batch of decisions than was given out on Monday of last week, including as it did, the three tariff suits, the validity of the McKinley act, involving the settlement of the "counting a quorum" question, the Behring Sea case, the Anarchist cases, the Austrian bond lottery case and the Trinity Church labor case.

The peculiarity of all these cases is that they not only involve constitutional questions, but go straight to the most delicate questions affecting the respective rights of the three branches of our federal system, legislative, executive and judicial. As has been pointed out many times by constitutional writers, there is no other tribunal on earth which possesses this power to annul a law of the land, and even to check the supreme magistrate in the exercise of authority. When the federal constitution was adopted, European critics contended that though it was ingeniously constructed, it would not work. The chief reason why in their opinion it was doomed to failure, was this threefold and co-ordinate division of power. They said that it could never endure the inevitable strain. Each branch would try to usurp the functions of one or both the others. These predictions of disaster have never been realized and the decisions to which we refer are convincing arguments against such a possibility. The supreme court instead of snatching at every seeming chance to minimize the power of congress and the president, is as honorably and discreetly solicitous for the preservation of their authority as for the maintenance of its own dignity. Therefore the court says of the McKinley bill that the clear intent of congress shall not be frustrated by technicalities; of the quorum ruling, that the House of Representatives has a right to settle such matters of procedure for itself; of the Sayward seizure, that the Behring Sea controversy is one which the court will not attempt to wrench from the president and State department.

It is plain to be seen that if the justices of the United States Supreme Court were disposed to magnify their office unduly, they could, without any impeachable misconduct or even any palpable defiance of the constitution, decide such cases in a manner almost to paralyze the legislative and executive branches of the government.

Upon the subject of the power of congress to make a rule authorizing the speaker to count members present but not voting, in order to make a quorum, the court held that the constitution gave each house the power to determine the rules of its procedure; that the only question for it to consider was the power to make such a rule as that in question and not the advantages or disadvantages thereof. Either house may not, by its rules, ignore the constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.

There were three objections made to the validity of the McKinley tariff law. First, that the tobacco rebate section of the bill had been omitted in its enrollment after passage by congress and therefore that the bill signed by the president was not the bill passed by the legislative department of the government. Second, that the reciprocity feature was a transmission to the executive of the law making power, and therefore void, and third, that the act was void because of the sugar bounty provision.

Upon the first point the court said that the question whether an act signed by the president was actually the law passed by congress, was raised for the first time in the cases before it, and had received the most careful and deliberate attention. The court had arrived at the opinion that the enrolled act was conclusive. The signatures of the two presiding officers and of the president were complete authentication of the bill, providing the

forms required had been complied with. The object of the journal required to be kept by congress, it is said, was not that it might be consulted to determine the authenticity of an act of congress, but that there might be publicity of proceedings. This conclusion of the court is important as laying down the rule clearly for the future that the enrolled bill authenticated by the signatures of the presiding officers and signed by the president, is the law and is conclusive evidence as to the intention and expressions of the legislative power lodged in congress and the executive.

In regard to the reciprocity provision the court held that various decisions by it, and the practice of years, established the right of congress to give the president power by proclamation, at a future day to revoke or modify certain clauses of an act. The provision in question did not effect any transfer of legislative power but simply gave the president power to determine whether the time had arrived when the requirement of congress as to the act had taken effect. Upon this question however, Chief Justice Fuller and Justice Lamar dissented, claiming that in their opinion that portion of the act was void as being an unconstitutional transfer of legislative power.

NOTES OF RECENT DECISIONS.

REMOVAL OF CAUSES—FEDERAL COURTS—LOCAL PREJUDICE—ACT OF CONGRESS 1887 AND 1888. — Fisk v. Henarie is a construction of the new removal of causes act, by the Supreme Court of the United States. It is held that under Act Cong. March 3, 1887, as corrected by the act of 1888, providing in section 2 for the removal of causes upon the ground of local prejudice "at any time before the trial thereof," the right of removal is restricted to the term at which the cause might have been first tried in the ordinary course of procedure; and, after one or more trials and reversals, the right is lost, and that Rev. St. U. S. § 639, subd. 3, providing for the removal of causes on the ground of local prejudice by either plaintiff or defendant, was repealed by the removal act of 1887, which declares that "all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby repealed," since section 2 of the latter act, which covers practically the same ground as that subdivision, provides for removal by the defendant only, and contains other provisions inconsistent therewith. In view of the fact that Mr. Justices Field and Harlan dissent from the conclusion of the court, we deem it of interest to give both opinions in full. That of the majority of the court rendered by Mr. Chief Justice Fuller is as follows:

After this case had been pending in the State courts from November 13, 1883, to August 1, 1887, had been tried three times before a jury in the circuit court, there being one verdict for defendants, one for plaintiff, and one disagreement, and been heard in various phases three times in the supreme court of the State, the application was made for removal. Was this application in time? This question is to be determined upon a proper construction of section 2 of the act of congress of March 3, 1887, for it is not, and could not be, contended that the right of removal could then have been invoked on the ground of diverse citizenship. The application was filed July 30, 1887, and by its terms purported to be made under the act of 1887, to which act the order of the State court referred. Indeed, if subdivision 3 of section 639 of the Revised Statutes were repealed by the act of 1887, or, since some of the defendants were then and at the commencement of the suit citizens of the same State as the plaintiff, if a removal could be had at all, it could only be under the act of 1887. The judiciary act of 1789 provided that a party entitled to remove a cause should file his petition for such removal "at the time of entering his appearance in such State court." 1 St. 79. The act of July 27, 1866, relating to separable controversies, provided that "the defendant, who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause," etc. 14 St. 306. The act of March 2, 1867, relating to removal on the ground of prejudice or local influence, provided that the plaintiff or defendant "may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit," etc. *Id.* 558. The first subdivision of section 639 of the Revised Statutes was a re-enactment of the twelfth section of the judiciary act; the second subdivision, of the act of July 27, 1866; and the third subdivision of the act of March 2, 1867; and this subdivision adopted the phraseology of the act of July 27, 1866, namely, "At any time before the trial or final hearing" of the suit.

The act of March 3, 1875, said nothing about prejudice or local influence, but provided, in the case of diverse citizenship, that the party desiring to remove a cause should make and file his petition in the State court "before or at the term at which said cause could be first tried, and before the trial thereof." 18 St. 470, 471. This act repealed the first and second subdivisions of section 639 of the Revised Statutes, but left subdivision 3 unrepealed. Railroad Co. v. Bates, 119 U. S. 464, 467, 7 Sup. Ct. Rep. 285. In Insurance Co. v. Dunn, 19 Wall. 214, it was held that the word "final," as used in the phrase, "at any time before the final hearing or trial of the suit," applied to the word "trial" as well as to the word "hearing." And it has been often ruled that if the trial court had set aside a verdict and granted a new trial, or if the appellate cour,

had reversed the judgment and remanded the case for trial *de novo*, it was not too late to apply to remove the cause under the act of 1867 and subdivision 3. Vannevar v. Bryant, 21 Wall. 41; Jifkins v. Sweetser, 102 U. S. 177; Railroad Co. v. Bates, 119 U. S. 464, 467, 7 Sup. Ct. Rep. 285, and cases cited. But these and like decisions were inapplicable to proceedings under the act of 1875, as the petition was thereby required to be filed "before or at the term at which said cause could be first tried and before the trial thereof." This has been construed to mean the first term at which the cause is in law triable,—the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations; and it has also been decided that there cannot be a removal after the hearing on a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action. Gregory v. Hartley, 113 U. S. 742, 746, 5 Sup. Ct. Rep. 743; Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. Rep. 495; Laidly v. Huntington, 121 U. S. 179, 7 Sup. Ct. Rep. 855. The act of March 3, 1887, and also as corrected by the act of August 13, 1888 (25 St. 435), provided that "any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

In view of the repeated decisions of this court in exposition of the acts of 1866, 1867, and 1875, it is not to be doubted that congress, recognizing the interpretation placed on the word "final," in the connection in which it was used in the prior acts, and the settled construction of the act of 1875, deliberately changed the language, "at any time before the final hearing or trial of the suit," or "at any time before the trial or final hearing of the cause," to read, "at any time before the trial thereof," as in the act of 1875, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof. The attempt was manifestly to restrain the volume of litigation pouring into the federal courts, and to return to the standard of the judiciary act, and to effect this in part by resorting to the language used in the act of 1875, as its meaning had been determined by judicial interpretation. This is the more obvious in view of the fact that the act of March 3, 1887, was evidently intended to restrict the jurisdiction of the circuit courts, as we have heretofore held. Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. Rep. 303; *Ex parte* Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. Rep. 141.

We deem it proper to add that we are of opinion that the act of 1867, or subdivision 3 of the section 639, was repealed by the act of 1887. The subject-matter of the former acts is substantially covered by the latter, and the differences are such as to render the intention of congress in this regard entirely clear. Under the previous acts, the right of removal might be exercised by plaintiff as well as defendant; the application was addressed to the State court; there was no provision for the separation of the suit; the ground of removal was based upon what the affiant asserted he had reason to believe and believed; and action on the motion to remand could be reviewed on appeal or writ of error or by *mandamus;* while under the latter act the right is confined to the defendant; the application is made to the circuit court; the suit may be divided and remanded in part; the prejudice or local influence must be made to appear to the circuit court,—that is, the circuit court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the the allegation that, by reason of those causes, the defendant will not be able to obtain justice in the State courts; and review on writ of error or appeal or by *mandamus* is taken away. *Ex parte* Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. Rep. 141; Malone v. Railroad Co., 35 Fed. Rep. 625. The repealing clause in the act of 1887 does not specifically refer to these prior acts, but declares that "all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed." The provisions relating to the subject-matter under consideration are, however, so comprehensive, as well as so variant from those of the former acts, that we think the intention to substitute the one for the other is necessarily to be inferred, and must prevail. In King v. Cornell, 106 U. S. 395, 396, 1 Sup. Ct. Rep. 312, it was held that subdivision 2 of section 639, was repealed by the act of 1875, the repealing clause in which was the same as here, and Mr. Chief Justice Waite, delivering the opinion of the court said: "While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." The rule thus expressed is applicable, and is decisive. We are of opinion that the application for removal came too late.

Mr. Justice Harlan dissenting, says:

Mr. Justice Field and myself do not concur in the construction which the court places upon the act of 1887.

Section 3 of that act, requiring the petition for removal to be filed in the State court "at the time, or at anytime before, the defendant is required by the laws of the State, or the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff," excepts from its operation the cases mentioned in the last clause of section 2, namely, those in which a removal is asked upon the ground of prejudice or local influence. As to the latter cases, the statute provides that the removal may be had, upon a proper showing, "at any time before the trial." This means at any time before a trial in which, by a final judgment, the rights of the parties are determined. Under the act of 1887, there can be no removal, upon the ground of prejudice or local influence, unless it be made to appear to the circuit court of the United States that, on account of such prejudice or local influence, the defendant citizen of another State cannot obtain justice in the State courts. The existence of such prejudice or local influence is often disclosed by a trial in the State court in which the verdict or judgment is set aside. The fact of prejudice or local influence may be established by overwhelming evidence; still, under the decision of the court, there can be no removal, if the application for removal be not made before the first trial. We do not mean to say that, when a trial is in progress, the cause may be removed before its termination, even upon the ground of prejudice or local influence. But if, at the time the application is made, the cause is not on trial, and is undetermined, that is, has not been effectively tried, the act of 1887, in our judgment, authorizes a removal, on proper showing, upon the ground of prejudice or local influence, although there may have been a trial, resulting in a verdict which has been set aside.

The error, we think, in the opinion of the court is in applying to the act of 1887 the decisions under the act of 1875. The words in the latter act limiting the time within which the application for a removal must be made—"before or at the term at which said cause could be first tried, and before the trial thereof"—necessarily meant, as this court has held, the first trial, whether it resulted in a verdict or not, and although the verdict and judgment may have been set aside; because the express requirement was that the application for removal must, in any event, be made before or at the term at which said cause could be first tried. No such requirement is found in the act of 1887 in respect to cases sought to be removed upon the ground of prejudice or local influence; while in respect to all cases of removal, except those upon the ground of prejudice or local influence, the latter statute provides that the application shall be made at the time, or at any time before, the defendant is required by the laws of the State, or the rule of the State court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff, the removal, because of prejudice or local influence, may be applied for "at any time before the time thereof." This difference in the language of the two acts means, we think, something more than the court attributes to it. Congress could hardly have intended to give the defendant citizen of another State simply the time between his answering or pleading, and the calling of his case for the first trial thereof, to determine whether he should apply for a removal upon the ground of prejudice or local influence. In our judgment, it meant to give the right of removal, upon such ground, at any time, when the case is not actually on trial, and when there is in force no judgment fixing the rights of the parties in the suit. If a case is open for trial on the merits, an application for its removal before that trial commences is made "before the trial thereof." In our opinion, the interpretation adopted by the court defeats the purpose which congress had in view for the protection of persons sued elsewhere than in the State of which they are citizens.

MUNICIPAL CORPORATION—ACTION AGAINST FOR DELAY IN GRADING STREET.—Mathewson v. City of Grand Rapids, 50 N. W. Rep. 651, decided by the Supreme Court of Michigan, was an action for damage for delay in the execution of a contract to grade and fill defendant city's street. Plaintiff alleged that in the performance of the contract according to the specification the embankment extended beyond the street line, and upon private property, and that they were delayed in the execution by an injunction by one of the adjacent property owners; that by the contract defendant assumed to have the right, as against such adjacent property owners, to make such improvement, and was responsible for the delay. It appeared that plaintiff finally completed the work, and received pay in full. It was held that plaintiffs could not recover, since it was their duty, as well as that of defendant, before entering upon the contract, to ascertain the right of the city to rest a portion of the embankment on the abutting premises without the consent of the owners. The fact that the board of public works requested plaintiffs to desist from work on any portion of the street pending the injunction suit by one of the adjacent owners did not make defendant liable for the delay, since such request by such board was *ultra vires* and void. Upon the law of the case the court says:

The cases cited by plaintiffs' counsel do not reach the case before us. I have carefully examined these cases, and find but few of them to have any connection with the point here in controversy. In Doolittle v. Nash, 48 Vt. 441, the railroad company was enjoined from constructing its road upon certain lands, because it had not acquired the right to do so; thereby the performance of the contract by plaintiff in that case was prevented. Plaintiff was a subcontractor under defendant. The court held that the injunction was without the fault of either of the parties, but said that the defendant was impliedly under the same obligation to see that the plaintiff had the opportunity to perform his contract that the plaintiff was to perform it. "It was the business of the defendant to know before he made the contract, and thereby induced the plaintiff to incur the expense of preparation, that he had the right to have the contract performed. If he had not the right, then he was in fault in making the contract, and should be liable to the plaintiff in damages, and it is no answer to say that he supposed he had the right and acted in good faith." It was intimated that, if the injunction was unlawfully obtained, the defendant had his remedy upon the injunction bond; if rightfully obtained, then the defendant would have his remedy against the railroad company, it being the party in fault. This decision seems to be based upon the idea that, if the plaintiff had no right of action against defendant, he was without remedy, and must bear the loss, which would be unjust; and that the party in fault would be liable to the defendant for what he was obliged to make good to plaintiff, and in the end the loss would be borne, as it ought to be, by the party in fault. The railroad company was presumed to know whether it had acquired the right to pass over the lands, and for that reason would be liable for the damages resulting from its failure to obtain such right. It will be seen that no municipal corporation or its agents were involved in the suit, and the rights and remedies discussed were those of private persons or corporations. In Bill v. City of Denver, 25 Fed. Rep. 344, the plaintiff was employed by the city as an inspector of sewers. The city passed an ordinance creating a sewer district, reciting that it was in accordance with the petition of a majority of the property owners,—a condition required by the law. After considerable work had been done, it was ascertained that a majority of the property owners had not petitioned, and the city abandoned the work. The court held that the city was liable for the work done by plaintiff on this sewer, on the ground that there was no other body or tribunal to pass upon the fact whether a majority of the property owners had petitioned for the improvement. So that the action of the council in the first place reciting that a majority had so petitioned, was conclusive upon the city as against the plaintiff, and

that he had a right to rely upon the fact that the city had power to proceed and make a levy to pay for the work. In Moore v. Mayor, etc., 73 N. Y. 238, the action was brought for a balance upon a contract fully performed by the plaintiff for the paving of certain streets in the city of New York. The payment was resisted on the ground that the resolution authorizing the paving was not published in the *Leader* according to law. It was held that the city must pay; that the act of paving these streets was within the general power of the municipality; that there was no apparent defect in the proceedings upon the journals of the common council; and that the irregularity claimed—and it was only an irregularity — was the omission of an act *in pais* outside of the council chamber, and of which no record would appear in the journals of the council. It was held, under these circumstances, that an individual, dealing with the agents of the city government, should be permitted to regard the acts of the government as valid, in the absence of any apparent defect either in the power or the manner of its exercise.

These are the only cases cited that have any close bearing upon the question at issue here, and, as it will be seen, they fail to touch it. The specifications in the contract before us provided that the street should be graded 66 feet wide, the whole width of the street, and that when the embankments were made they were to be "made with the side slopes of one and one-half feet horizontal to one foot vertical." It was as plain to the plaintiffs as to the city officers that when the embankments were made, if the street was graded its full width, the embankment must rest more or less upon the lands of abutting owners. To so use these lands without compensation, and without the consent of the owners, was not within the general powers of the municipality, and the plaintiffs in such case were bound to know the limit of such power. Moore v. Mayor, etc., 73 N. Y. 245; Newman v. Slyvester, 42 Ind. 106. And when the city acted in good faith in letting this contract under the misapprehension that it had a right to so use the abutting property, as a natural and necessary incident to the improvement of the street, without compensation to the owners, and without their consent, and when the plaintiffs also supposed they had such right, they having the like knowledge of the law, which all are supposed alike to know as the common council, the city cannot be held liable to plaintiffs for damages claimed for interruption of the work by the injunction of Mrs. Vanderlip. It was for plaintiffs, as well as the common council, to make inquiry as to the right of the city to place or rest a portion of the foundation of its embankment upon the abutting premises. It was their duty to know whether the city had the right and common prudence required them to ascertain the authority of the city before they undertook the work. See Newman v. Sylvester, 42 Ind. 111-113, and cases there cited. In Davies v. City of East Saginaw, 66 Mich. 37, 32 N. W. Rep. 919, in a grading contract exactly like this in respect of its grades to its full width of 66 feet, we held that the contractor could not recover for the work actually done in filling outside on the street line (see page 40, 66 Mich., and page 920, 32 N. W. Rep.), for the reason that neither the city nor the contractor had the right to put any dirt upon the abutting lands. In this case plaintiffs received pay for all the work they did at the contract price, and cannot recover for damages occasioned by the stoppage of the work by injunction because of the unlawful act of the city, in which they joined. There is no claim in the declaration that the city knowingly misled the plaintiffs.

ESTOPPEL BY DEED—INCAPACITY OF UNINCORPORATED ASSOCIATION TO TAKE LAND.—The Supreme Court of Missouri, in Reinhard v. Virginia Lead Min. Co., hold that where a grantor in good faith and for a valuable consideration conveys land by deed duly recorded to an association named therein as the grantee, he and his subsequent grantees are estopped to deny the capacity of such grantee to take lands as against it or its grantees, although owing to a mistake of the attorney the incorporation of the association was not perfected until after such conveyance. Macfarlane, J., says:

The promoters of the corporation purchased the land and paid out their money under the belief that the corporation was authorized at that time to hold the title. They acted, as was supposed, in full compliance with the laws of the State provided for the management of corporations. The demands of plaintiffs do not commend themselves to a court of equity, and unless the court is fettered by legal principles they should not be heard to assert them. The legal principles invoked by plaintiffs are: First, in order to a valid and effectual conveyance of land there must be a grantee in being at the time of the delivery of the deed; and, second, a corporation has no existence until after a full performance of every requirement of the law under which it is authorized. Both these propositions have support in decisions of this court. It has been held in this State, as at common law, that a deed will not take effect, or have any validity as a conveyance of the property, unless the grantee therein is in being at its delivery. A deed to W. H. Phelps & Co., which was a partnership firm, composed of Phelps and two others, was held to pass no title to the firm or the two persons not named. Arthur v. Weston, 22 Mo. 379. So it was held in Douthitt v. Stinson, 63 Mo. 268, that a deed to a pretended corporation, which had no real existence, was absolutely void. In Thomas v. Wyatt, 25 Mo. 24, a patent issued to a fictitious person was held to be a nullity. A deed to the directors of a corporation, which was named therein, which then had no existence, but was subsequently organized, was held to pass no title to the corporation. These decisions were all made in actions at law. Judge Leonard qualifies his decision in the case first cited by the remark: "We must not, however, be misunderstood. Our present decision refers to the transfer of the legal estate only, and does not touch the equitable rights of the parties growing out of the transaction." It has also been held that a corporation is not fully authorized to transact the business for which it was created until the articles of association had been filed with the secretary of State; and a note executed by the directors, signing their names as such, before filing the articles with the secretary, became the personal note of the directors, and did not bind the corporation. Hurt v. Salisbury, 55 Mo. 312. This decision was approved in the subsequent cases of Martin v. Fewell, 79 Mo. 401, and Richardson v. Pitts, 71 Mo. 129. On the other hand, in Mining Co. v. Richards, 95 Mo. 110, 8 S. W. Rep. 246, it was held that the failure to file a

certificate of incorporation with the circuit clerk, as was required by the statute, was an "omission of which the State alone should complain." The suggestion was made in that case that the rule of Hurt v. Salisbury, *supra*, should not be extended. These suits were against persons assuming to act as officers of corporations which had not fully organized for the transaction of business.

We do not regard these lines of decisions as bearing upon the question in this case, or as inconsistent with the doctrine of estoppel invoked by defendants. The grantors of plaintiffs dealt with the officers of this corporation in the corporate name, received the money of the supposed corporation, and undertook to convey the land to it in consideration thereof. The question here is, as has been suggested, whether plaintiffs occupy a situation in which they can deny the validity of the corporation or its acts. This question we think well settled in this State, and there is no necessity of inquiring whether or not this was a *de facto* corporation, capable of taking the title of land by grant. The facts in the case of Broadwell v. Merritt, 87 Mo. 99, are very similar to those in the case under consideration. The articles of association were written, signed, acknowledged, and recorded as required by the statute, but a copy was not filed with the secretary of State, which was also required. The business of the attempted organization was, with others, that of buying and selling real estate. The officers of the corporation bought a tract of land from one Little, and the deed was made to the corporation. Some years after that the organization of the corporation was perfected by filing with the secretary of State a copy of the articles, as required. Before this was done, however, and about six years after making the deed to the corporation, Little conveyed the land by quitclaim deed to Broadwell, who sued the grantee of the corporation in ejectment. It was held that the validity of the corporation could not be challenged by plaintiff, on the ground that there was no grantee therein competent to take the title. The court in that case, speaking through Judge Ray, says: "We do not think that Little, after receiving the large and valuable consideration paid him for the land, and making his said deed to the association, and taking the trust-deed from it, and putting it in possession thereof, and allowing it to be improved and held under his title for years, could or ought to be heard to call in question the capacity or power of the association to take title to the property, and hold or enjoy the same. Broadwell, who takes under Little under his said subsequent deed, is in no better position. He is in privity with and bound and estopped by what would bind and estop said grantor." A number of cases of this and the United States Supreme court are cited in support of the proposition. The decision was followed and approved in Ragan v. McElroy, 98 Mo. 350, 11 S. W. Rep. 735, in which also a deed to a corporation was objected to, on the ground that it had not been shown that the corporation was properly organized. It was held that the grantor and his heirs were forever estopped from denying the corporate existence of the grantee as against those who have acquired title and possession under that deed. In a similar case in the United States Supreme Court Mr. Justice Davis says: "No proposition is more thoroughly settled than this, and it is unnecessary to refer to the authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it; and in such a case the party who makes a sale of real estate to it is not in a position to question its capacity to take the title after it has paid the consideration for the purchase." Smith v. Sheeley, 12 Wall. 360; Bank v. Matthews, 98 U. S. 621. These decisions commend themselves as being founded on the soundest principles of equity and right. It is true, as insisted, that no question of estoppel can arise under a deed which is absolutely void. This proposition was distinctly held in Douthitt v. Stinson, *supra*. In that case, however, there was no law authorizing the formation of the corporation to which attempt was made to convey the land. Estoppel applies to the regularity of the organization of the corporation, and can only apply when there is authority of law to organize. Jones v. Type Foundry Co., 14 Ind. 89. The statutes of this State gave ample authority for the organization of the Virginia Lead Mining Company, and plaintiffs are estopped to deny the regularity of its organization.

THE DE FACTO DOCTRINE AND JURISDICTION.

Probability is the natural guide to human conduct in the ordinary affairs of life, and the *de facto* doctrine is neither more nor less than a recognition of that fact. Where one is openly and notoriously engaged in the discharge of official duties, and where the right to discharge them is acquiesced in by the public generally and not denied or questioned by the State in its sovereign capacity, the natural conclusion to be drawn from these facts is that the person so assuming to be an officer of the State is in fact legally entitled to act as such officer and to exercise the authority One who acted from common experience, that is, one who exercised only his common sense, would unhesitatingly rely on the probable truth of this conclusion, and the courts early declared this conclusion to be common law. As early as Knowles v. Luce,[1] it was declared to be the law that the public could not reasonably be compelled to inquire into the title of an officer, nor he be compelled to show a title to the office he assumed to hold. This presumption of the title of the incumbent to the office he holds can be questioned only by the State, or, generally speaking in a direct attack by one over whom the officer assumes to exercise authority, or in an action involving the right of the officer to compensation for his service. In other cases generally, and always against the one claiming the official character, the presumption is absolutely conclusive.[2] It requires only a

[1] Moore, 109.

[2] *Cf.* 5 Am. & Eng. Enc., title *de facto;* Morawetz

moment's consideration of the results which would follow its denial to appreciate not only the wisdom, but indeed the absolute necessity of indulging this presumption. The statement of this presumption is the *de facto* doctrine of the law. In its application to judicial offices there are seven distinct classes of cases in which this presumption of official title and the other presumption from which it can scarcely be separated, that of extent of official authority, are presented. First: Cases in which an officer *de jure* assumes authority in excess of that which pertains to his office. Second: Cases in which one having color of title but not being an officer *de jure* exercises authority within the limits of the jurisdiction of the office, legally existing, of which he is in possession. Third: Cases in which one having color of title but not bring an officer *de jure* exercises authority in excess of the jurisdiction of the office, legally existing, of which he is in possession. Fourth: Cases in which one having color of title but not being an officer *de jure* exercises authority in an office, not legally created, of which he is in possession. Fifth: Cases in which one without color of title assumes to exercise authority within the limits of the jurisdiction of the office, legally existing of which he is in possession. Sixth: Cases in which one without color of title assumes to exercise authority in excess of the jurisdiction of the office, legally existing, of which he is in possession. Seventh: Cases in which one without color of title assumes to exercise authority in an office, not legally created, of which he is in possession. There are also cases in which one without color of title and not being in possession of an office under any claim of title assumes the right to exercise judicial functions in a single case, or at a particular term of court, with or without the express consent of the parties interested, but in this class the element of the presumption of a legal title is wanting, and as that element is essential to the application of the *de facto* doctrine this class is not to be considered in this connection. The diversity of recent decisions makes it necessary to recognize each of the above enumerated classes as a separate class, although considering only the majority of the cases, they really can be probably divided into two classes. The majority of recent American cases hold that the judgment rendered by the judicial officers in the cases enumerated as the first, third, fourth, sixth and seventh classes are absolutely void, and may be attacked collaterally and in any kind of an action, while in the cases enumerated as the second and fifth, the judgments are valid. The distinction made is that the judgments are void where the judge assumes to exercise authority which does not belong to the office of which he is in possession, or where the office itself has no *de jure* existence, but they are valid where the judge exercises authority, whether he has color of title or not, strictly within the limits of the jurisdiction of a legally created office of which he is in possession, for the reason that the *de facto* doctrine is applied in the latter but not in the former cases.

In other words, the *de facto* doctrine is invoked to raise a presumption of title to an office but not to raise a presumption of the possession, of the authority actually exercised by an officer. A strong statement of these propositions and the conclusions which follows their application is made in the majority opinion of the Supreme Court of Nevada in a recent case,[3] where it is declared that one who attempts to discharge the duties of a judicial office which the legislature attempts to create by an act which the supreme court holds to be unconstitutional "is a usurper whose acts would be absolutely null and void and could be questioned by any private suitor in any kind of an action or proceeding." In that case the proposition was not applied because the court held that there was an office legally existing, and that therefore the incumbent though illegally appointed to fill it was a *de facto* officer. While the fact itself is of no value whatever, it is nevertheless interesting to note that on the important question in the case as to whether there was a legal office the court was as equally divided as a court of three members could be. This suggests how narrow an escape the judge had from being adjudged "a usurper," and by how close a vote the judgments of the court were saved from being declared "absolutely null and void." But the judge whose judgments were before the court in a recent case

on Corp. § 640; Litchfield Iron Co. v. Bennett, 7 Cow. 234; Johnston v. Jones, 23 N. J. Eq. 216; Dispatch Line v. Bellamy Mfg. Co., 12 N. H. 223; Coyle v. Commonwealth, 104 Pa. St. 130.

[3] Walcott v. Wells, 24 Pac. Rep. 867.

in California[4] was less fortunate, for there the supreme court, while not stating the case as broadly as was done by the Nevada court, nevertheless applied its doctrines to the fullest breadth by permitting a collateral attack to be made on the judgment of a court by denying the constitutionality of the act creating it, and the court, holding the act unconstitutional, held the judgment of the court to be absolutely void." The court was divided in this case also, but on the one proposition which was made the ground for the conclusion of the majority there was no dissent. Its application only was denied. That proposition, which has an axiomatic sound, was this: "There cannot be a *de facto* judge of a court which has no existence." This has been frequently stated[5] and as generally admitted. Yet while this proposition is logically sound it is no more so than the proposition there there cannot be a judge who is not judge *de jure*, yet this last is very poor law. And there is no reason contained in the statement of the first proposition that requires its acceptance as good law. It must not be lost sight of that the *de facto* doctrine does not owe its existence to its logical soundness. It is not a deduction of logic but a rule of policy. It is an arbitrary assumption of the existence of a condition of affairs which does not in fact exist. It is the declaration of the law that under certain circumstances and for certain purposes it will be conclusively presumed that one who is in possession of an an office under claim of right has in fact a legal right to the office. It is a rule founded on expediency alone and not on logic. This is clearly stated in the leading case of State v. Carrol,[6] where it is said: "The *de facto* doctrine was introduced into the law as a matter of policy and necessity to protect the interests of the public and of individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers." The Supreme Court of the United States declare to the same effect:[7] "The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity for the protection of the public individuals whose interests may be effectual thereby." It is unnecessary to multiply citations to the same effect as the statement of the proposition proves its truth and the decisions are in harmony.[8] Considered from this standpoint there can be no doubt but that the courts which require the existence of a *de jure* office, as essential to the existence of a *de facto* officer, and those which require that the authority exercised be exercised strictly within the prescribed limits of a *de jure* office, lose sight of the main purpose of the doctrine and overlook the question of public protection involved.

The distinction recognized by these courts is moreover artificial and illogical, for it attempts to distinguish between the official character of an officer and his official acts. This is unnatural and unscientific, if not quite impossible, and has resulted in such an endless conflict of decisions that little is gained by studying them. This in itself is unfortunate in a system of jurisprudence in which every man is bound at his peril to know the law. If the public interest which required the recognition of the *de facto* doctrine in the first place were to be considered, it would require most of all that the presumption to be indulged should be of the extent of authority rather that if the mere title to the office, for to require, as the courts do, an investigation of the limits if the jurisdiction of the office involves a greater burden than that of investigating the title of the officer, because the question of title can generally be determined by a reference to some existing record, whereas the question of the valid existence of the office or the limits of its power may be hidden away in the secret recesses of a majority of the numerous breasts of a supreme court which may not yet have been elected. The interest of the public is hardly served by requiring this or in keeping alive the distinction I have referred to. This is the more certain when it is born in mind that the distinction is only made in cases where the attack is collateral. That means that although the parties whose interests were involved may have acquiesced in the jndgment rendered and failed or refused to make a direct at-

[4] State v. Toal, 24 Pac. Rep. 603.

[5] See *Ex parte* Snyder, 64 Mo. 58; *In re* Hinkle, 31 Kan. 712.

[6] 38 Conn. 449.

[7] Norton v. Shelby County, 118 U. S. 441.

[8] Morawetz Corp. § 640.

tack, yet afterward either the same parties or others who are interested either in transferring the controversy to another forum or in securing relief which they failed to seek at the proper time, are allowed in some other proceeding to deny the validity of the judgment for want of power in the judge to render it. This is not in accordance with the common idea of a wise administration of public affairs; it is subversive of judicial authority by allowing a right of appeal where no power exists to reverse the judgment and is shocking to our sense of justice. For these reasons the rule should be changed or a remedy found to counteract its evils.

A sufficient remedy would be found in applying to jurisdiction the *de facto* doctrine or the same doctrine of presumptions by whatever name it may be known. The inclination of many of the courts has been in the direction of a liberal construction of the *de facto* doctrine.[9] Strange as it may seem, the contrary tendency is justified on ground of public policy. The statement of these grounds is thus vigorously expressed by Mitchell, J., in his dissenting opinion in Burt v. Railway Co: "As suggested in the majority opinion, the *de facto* doctrine is founded on reasons of public policy and necessity, but it must have some reasonable limit, unless we are ready to recognize practical revolution and legislative right to ignore all constitutional barriers." The question he was discussing was whether there could be a *de facto* judge of a court organized under an unconstitutional statute. The majority opinion was that there could be, but the minority considered this to be carrying considerations of public policy to an unreasonable limit. To one removed from the scene of local political contests, the conclusion that the opinion of the majority was a recognition of "legislative right to ignore all constitutional barriers" would seem to have been arrived at otherwise than by the application of cold logic. It is unfortunate that a rule which the public requires for its protection should depend for its application in any particular case on the opinion of the judges as to the reasonableness of the limit to which such application would extend it, for this element if recognized destroys all certainty in its application. It is the recognition of this element which has caused the unfortunate conflict in the cases on this subject, and may lead to an uncertainity in the law which is no less dangerous than that which the doctrine was invoked to ward off. To the suggestion that relief would come from the application of the *de facto* doctrine to sustain a presumption of authority, it may be objected that there are no precedents to justify its application to such cases. And it is apparently strange if the necessity does exist and the doctrine is applicable that it has not been applied. But this apparent strangeness disappears upon an examination of the subject. Until very recently in this country, and always in England, the same result was attained by the application of the doctrine of presumptions but on another line and by a different name, and therefore the application of the *de facto* doctrine was not required. The courts sustained jurisdiction by declaring jurisdiction to be the power to hear and determine a controversy, and any court having jurisdiction to this extent in any case necessarily had to determine the extent of its jurisdiction. Its determination of this fact, like its finding of any other fact, was conclusive, except as against a direct attack, and the decision whether right or wrong could not be collaterally questioned. This was well illustrated in an English case,[10] in which the court having jurisdiction to try cases of burglary with power to imprison, but without power to transport, imposed a sentence of transportation. The prisoner applied to the Queen's Bench for his discharge by *habeas corpus*. This the court refused denying that it had the power. In giving the opinion of the court Lord Denman, C. J., said; "We are bound to assume, *prima facie*, that the unreversed sentence of a court of competent jurisdiction is correct, otherwise we should be in effect constituting ourselves a court of appepl without power to reverse thejudgment." The federal courts of this county with less sensitive regard for the decisions of the State have adopted a rule by which a district judge at chambers may overrule the doctrine of any State court

[9] Campbell v. Commonwealth, 96 Pa. St. 344; Coyle v. Commonwealth, 104 Pa. St. 117; Carland v. Custar, 5 Mont. 579; State v. Bloom, 17 Wis. 521; Sharp v. Thompson, 100 Ill. 447; Morris v. People, 3 Den. 381; People v. White, 24 Wend. 520; *In re* Kendall, 85 N. Y. 402; Brown v. O'Connell, 36 Conn. 432; Fowler v. Beebe, 9 Mass. 231; Burt v. Railway Co., 31 Minn. 472; Threadgill v. Railway Co., 73 N. C. 178; Bailey v. Fisher, 38 Iowa, 229.

[10] *Re* Brenan, 10 Q. B. 472.

with impunity. Starting with the power possessed by all courts to inquire whether a judgment brought before them was rendered by a court having jurisdiction in the matter, it was only necessary to declare that jurisdiction was not alone the power to hear and determine such a controversy as was before the court in which the judgment was rendered, but the power to render the particular judgment actually rendered. It is unnecessary to trace the history and growth of this doctrine in this connection as it was ably done in a paper which appeared in this JOURNAL some time ago,[11] and still more recently in the American and English Encyclopædia of Law.[12] The danger of this doctrine lies in the fact that its application enables any court to overrule the decision of any other court in any case where it may determine that the court rendering the decision erred in its conclusion as to the extent of the jurisdiction. The danger of granting to the courts this unlimited appellate jurisdiction, to say nothing of the danger which must follow the withdrawal of the presumption in favor of the jurisdiction of every court, is, I submit, far greater than that to be apprehended from the creation by legislatures of courts not authorized by the constitutions of their States or by the assumption by courts of unwarranted power. In fact it is difficult to see how any danger could follow from these, since any such assumption of unconstitutional or unwarranted power could at once be destroyed by the direct attack of an appeal. It is undoubtedly true that this modern idea of jurisdiction has been so generally adopted in this country, supported as it is by the prestige of the opinion of the Supreme Court of the United States, that there is but little reason for hoping that the courts will of themselves abandon it. The temptation to enlarge their power is a constant incentive for the courts to hold to the modern doctrine and extend rather than limit it. A recent Massachusetts case illustrates this.[13] In this case the court allowed a collateral attack to be made in Massachusetts on a judgment rendered in California. The California record showed that the court there found that the plaintiff had been a resident of that State for the necessary time required to confer jurisdiction. Nevertheless the Massachusetts court declares that unless this fact was true there was no jurisdiction, and if no jurisdiction no valid judgment, and thereupon proceeded to try the question of residence which it found not to have been for the necessary length of time, and thereupon incontinently adjudged the California judgment to be void. Public policy was evidently not considered. The remedy which must be found will probably come through legislation.

WILBER L. STONEX.

[11] The Modern Idea of Jurisdiction, by Seymour D. Thompson, 19 Cent. L. J. 102.

[12] 12 Am. & Eng. Encyclopædia of Law, p. 24, n. 1.

[13] Adams v. Adams, 28 N. E. Rep. 260, 33 Cent. L. J. 375.

PARENT AND CHILD — CUSTODY OF INFANT.

GREEN V. CAMPBELL.

Supreme Court of Appeals of West Virginia, Dec. 7, 1891.

The father of an infant, upon the death of its mother, when it was sixteen months old, intrusted it to its maternal grandparents, very worthy people, of high moral character, who had a suitable home, sufficient means and were willing to properly rear and care for it, though they stipulated at the time that they should not afterwards be deprived of its custody. The father upon his second marriage, brought a writ of *habeas corpus* for the custody of the child who was then nearly five years old. It appeared that he was a young man of 32 years, sober, industrious, of good family, living on his own farm; that his wife was an estimable young woman of 22 years, who had yet no children, but who wished to care for this child, because it was her husband's. *Held*, that the father's right of custody, as natural guardian of his child, is subordinate to considerations of its welfare; that under the circumstances its welfare would not be promoted by removing it from the custody of its grandparents, by whom it was in every way properly cared for, and to whom it was much attached, and placing it in the home of a stranger.

HOLT, J.: This was a writ of *habeas corpus* sued out of the circuit court of Monroe county on the 18th day of August, 1890, on petition of Robert Green, the father, against James A. Campbell, the grandfather, to compel the latter to give up to the father the custody of Green's infant son, Thomas Campbell Green, then three and one-half years old, as unlawfully detained by the grandfather. The circuit court, having heard the evidence of witnesses and the argument of counsel, was of opinion that the infant was not unlawfully detained by the grandfather, but, on the contrary, that he was entitled to the custody and control of the infant; and from this decision Green, the father, has brought the case here by appeal. The facts are as follows: Robert Green, the plaintiff, married the daughter of James A. Campbell, the defendant. Thomas Campbell Green, the infant, the right to whose custody is the matter here in dispute, is now three and a half years old. His

mother died when he was 16 months old, when he was committed by his father to the care and custody of his grandmother and grandfather, the defendant, who have raised, supported, and had the sole care and custody of the child from that day to this. Campbell, the grandfather, and his wife, are sober and industrious; of high moral character, Campbell owning considerable property, including a farm on which he lives, in the county of Monroe, and is well able to take care of the child according to its condition in life. Both these grandparents are devoted to the child, and the child devoted to them, and they have no living children of their own except a son over 21 years of age, a young man well raised and of high moral character. Thus far the grandparents have provided everything for the comfort and well-being of the child, as they are well able to do. Robert Green, the father, is 32 years old, sober, industrious, of high character, good family, and capable of providing for and raising his child according to its station in life, is warmly attached to it, and it to him. At the death of his first wife he was living in the same house with his father-in-law, and cultivating a part of Campbell's farm as his tenant. He married a second wife in May, 1890, about 22 years of age, who has no children as yet, and who desires to have this child with her and care for it, it being her husband's only child. Robert Green, the plaintiff, owns a farm about three miles from Campbell's, on which he now lives with his second wife, of what kind or of what value we are not informed. Thus far there is no controversy about the facts.

The grandparents of the child claim and testify that, upon the death of the mother, Green's first wife and their daughter, Green relinquished the child to their care and custody, with the express understanding and upon the express condition that it was not after a while to be taken away from them; that Green assented, with the understanding that he was to see him and take him around with him sometimes, to which Campbell and wife agreed, saying that if anything should happen to them, so that they would not be able to take care of it, they should expect Green then to take the child and care for it; that Green assented, and upon these terms and conditions they took the child, and have thus far kept and cared for it, as already stated. Campbell and wife are borne out in their statement by another witness. In fact, Green does not deny what was said and done, but claims that what he meant was that they were to keep the child, but only until such time as he might be in a position to have it properly cared for himself; being then unmarried and without a family. Mrs. Campbell, the grandmother, during this conversation about keeping the child, told Mr. Green that "she had seen some old people have trouble enough in taking children to raise, and then having to give them up, and that she did not intend to be treated in that way." Green does not deny this, and it is a very strong circumstance tending to confirm their understanding of what took place. "The father of the minor, if living, and, in the case of his death, the mother, if fit for the trust, shall be entitled to the custody of the person of the minor, and to the care of his education." See section 7, ch. 82, Code (Ed. 1891). But "the right of the father or mother to the custody of their minor child is not an absolute right to be accorded to them under all circumstances, for it may be denied to either of them, if it appears to the court that the parent, otherwise entitled to this right, is unfit for the trust." State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801. The father is the natural guardian of his infant children, and in the absence of good and sufficient cause, such as ill usage, grossly immoral principles or habits, want of ability, etc., is entitled to their custody, care, and education. Rust v. Vanvacter, 9 W. Va. 600; State v. Reuff, 29 W. Va. 751, 2 S. E. Rep. 801. Where the father has not the custody of the child, and is seeking to be restored to it, the court will exercise its discretion according to the facts, consulting the wishes of the minor, if of years of discretion; if not, exercising its own judgment as to what will be best calculated to promote the interests of the child, having due regard to the legal rights of the party claiming the custody. Armstrong v. Stone, 9 Grat. 102, 107. The courts of equity of this State, in granting divorces, may decree as it shall deem expedient concerning the care, custody, and maintenance of the minor children, * * * and may revise or alter such decree, as the circumstances of the parents and the benefit of the children may require, (see section 11, ch. 64, Code, Ed. 1891, p. 614, showing the discretion given the court in that class of cases), but that such discretion is to be guided by considering what will be of benefit to the children rather than by any legal right of the parent; and such is the manifest tendency of the modern doctrine on the subject. This writ, with so memorable a history, and now so highly prized among English-speaking people everywhere, designed and admirably adapted to secure individual freedom, without which a vital part of the great charter itself might have been but a solemn asseveration of abstract right, has come to be applied to other uses, and, among them, to the ascertainment and enforcement of the right of custody of infant children. Mathews v. Wade, 2 W. Va. 464. But it is not to be forgotton or overlooked that such use of this writ is of an equitable nature, and therefore the welfare of the infant is the polar star by which the court is to be guided in the exercise of its discretion; and the court, when asked to restore, is not bound by any mere legal right of parent or guardian, but is to give it due weight as a claim founded on human nature, and generally equitable and just. Armstrong v. Stone, 9 Grat. 102-107; Church, Hab. Corp. §§ 440-442. "The court is in no case bound to deliver the child into the custody of any claimant or of any other person, but may leave it in such custody as the welfare of the child at the time appears to require." Hurd, Hab. Corp. (2d. Ed.) 461. The

court does not establish a permanent custody, but one intended to continue until a change of circumstances shall, in respect of the infant's welfare, require a change of custody, or until the infant has reached the age of 14 years, when, by statute, he may nominate his own guardian, subject to the parent's right and to confirmation by the court. Section 4, ch. 82, Code, p. 673.

Looking at the question now in hand in this light, and applying these principles, there are some reasons why the father should not have asked for what he is here seeking, and still more why the court should not grant it. These I shall endeavor to give briefly in the language of the facts of the case, for there really can be no serious controversy about the only material disputed point, which is not the turning point in my view in any event. How could Robert Green, the plaintiff, have misunderstood the meaning and intent of the mother of his dead wife, when she told him in advance, and as a condition of her taking this infant, then 16 months old, to raise it, that she did so with the express understanding that it was not to be given up to him, only in the unexpected and improbable contingency named by her, and was not to be taken from her and her husband after they had had the trouble of raising it, when, as the child of their old age, they had become more attached to it than to any child of their own. Plaintiff handed her the child, and she took it. It is a little like a man saying that it is not his bond, because when he delivered it he kept silent and said nothing. On this branch of the case, see Coffee v. Black, 82 Va. 567; Merritt v. Swimley, *Id.* 433; Clark v. Bayer, 32 Ohio St. 299, 30 Amer. Rep. 593; Chapsky v. Wood, 26 Kan. 650, 40 Amer. Rep. 321, and editor's note, citing and commenting on the following cases, among others: Verser v. Ford, 37 Ark. 27; Lyons v. Blenkin, Jac. 245; U. S. v. Green, 3 Mason, 482; Wilcox v. Wilcox, 14 N. Y. 575; Matter v. Waldron, 13 Johns. 417; Pool v. Gott, 14 Law Rep. 269; Durmain v. Greynne, 10 Allen, 270; State v. Libbey, 44 N. H. 321, qualifying State v. Richardson, 40 N. H. 272. See, also, *In re* Scarritt, 76 Mo. 565, 43 Amer. Rep. 768, and notes; Brooke v. Logan, 112 Ind. 183, 13 N. E. Rep. 669, 2 Amer. St. Rep. 177, and notes. In this case Mr. Freeman sums up what he deems the weight of American authority on this point, as follows: "A father can, by agreement, surrender the custody of his infant child to another, so as to make the custody of that other legal." To the same effect, see Hurd, Hab. Corp. 528; Tyler, Inf. p. 283. So that we have, as the law on the subject so far as involved in this case, as follows: (1) The father during his life-time, and after his death the mother, is entitled to the custody of the person of their infant child, because, by the law of nature, it is theirs to care for and bring up, and this right, is recognized and enforced by our statute. (2) But such right is not absolute, for the welfare of the infant may require the court, in the exercise of its sound discretion, to leave or intrust the custody to another. (3) The feelings and rights of one whom the father has put in the place of parent, and between whom and the child such relation has created mutual affection, are not to be subject to the whim and caprice of the father; but, unless it appears that the best interests of the child imperiously demand it, the court, in dealing with relations so delicate, so easily set ajar irreparably, will follow the discreet course of letting well enough alone. (4) And, to enable them to do this, the writ applied to this class of cases is of an equitable nature, and we should turn our back at once upon this qualified estoppel, if the infant's moral or physical welfare clearly pointed another way. In this case it does not, but on the contrary, plainly leads us in a direction which does not involve any breach of faith on the part of the father. This little boy, now nearly five years old, is himself, no doubt, attached to his grandmother,—he has known no other mother; to his grandfather; to his grown-up uncle; to the quiet, sober, old homestead, with its abounding comforts and plenty. Human nature and human experience are parts of the common law; there is no need that this child should speak. Can the plaintiff take him to a better home,—to one as good, for his present moral training and his physical comfort, present and to come, for some years, at least? What fact appears in this record that should induce us to drag him away to the home of a stranger, of a young married woman, good and amiable, in every way worthy of high esteem, but none the less she is a stranger, the mistress of a strange home, and likely, in the course of nature, soon to have about her those dearer to her than her own self? Plaintiff does not say that this new home of his is a better one for his child. He does not pretend to tell us why, or show us how, it is a better home than the present one, or that he is more able, or as able, to supply him in his tender years with what he needs as he is now supplied with, and sure to receive, for some years, at least. All he pretends to say, and that is a great deal, and very much to his credit as a man, is that he is extremely fond of his child. But this great fondness has in this instance blinded his better judgment, as, in all likelihood, he would to his sorrow have learned, when too late to restore his child to that comfortable and appropriate home which he, by fair agreement, provided for him on the death of his first wife, and will himself hereafter see, as others now foresee, that it is discreet, and not at variance with true, as contrasted with capricious, fondness, to leave his little boy where we find him. Therefore the judgment of the learned judge, who saw these parties face to face, and heard them testify, should be and is affirmed.

NOTE.—There is no doctrine more firmly established, than the distinctively American rule that the court, in disposing of contests as to the custody of minor children will be chiefly governed by considerations of the welfare of the child. The father's common law right as natural guardian of his children is not disregarded, but is treated as a trust or duty to be administered

for the benefit of the child rather as a strict legal right. See, in addition to the cases cited, Com. v. Gilkeson, 1 Phil. 194; State v. Smith, 6 Me. 462; Bonney v. Bonney, 3 S. W. Rep. 171; Corrie v. Corrie, 42 Mich. 509; Gishwiler v. Dodez, 4 Ohio St. 615; Sturtevant v. State, 15 Neb. 459; Jones v. Darnall, 103 Ind. 569; Giles v. Giles, 46 N. W. Rep. 916. And this principle has received recognition in the statutes of some of the States. St. Mass. 1882, ch. 181, § 3 amended by St. 1886, ch. 330; *Re* Kelley, 152 Mass. 430, 25 N. E. Rep. 615; Farnham v. Pierce, 141 Mass. 203, 6 N. E. Rep. 830; Rev. St. Wis. § 3964; Sheers v. Stein, 43 N. W. Rep. 728; Goodchild v. Foster, 51 Mich. 509. The English cases adhered to the rigid rule of the common law, and held that the father's right of custody was paramount, notwithstanding a degree of immorality, brutality and indifference which, under the American rulings, would disqualify him for the trust (*Ex parte* McClellan, 1 Dowl. 84; *Re* Hakewell, 23 Eng. L. & Eq. 395; *Ex parte* Dietrich Witte, 13 C. B. 680; Ball v. Ball, 2 Sim. Ch. 35; Rex v. DeManneville, 5 East 219; *Ex parte* Moon, 9 Skinner 278) until the case of Rex v. Greenhill, 4 Ad. & E. 624, 6 Nev. & M. 244, in which the judgment enabled the father to take his children from his young and blameless wife and puts them in the custody of his mistress, so shocked the public mind that a statutory modification of the rule in favor of the mother resulted (Act 2 & 3 Vict. ch. 54), though it still lacks the liberality and elasticity of the American doctrine. A somewhat more liberal view was taken in courts of equity, but as the jurisdiction could only be invoked in the case of infants possessed of an estate (Story Eq. Tur. § 1338) it was of limited application. Wellesley v. Wellesley, 2 Russ. 1, affirmed 2 Bligh. 124; Whifield v. Hales, 12 Ves. Jr. 492; Cruise v. Hunter, 2 Bro. Ch. C. 499*n*; 2 Cox Ch. C. 242; Ball v. Ball, 2 Sim. Ch. 35; De Manneville v. De Manneville, 10 Ves. Jr. 52; Duke of Beaufort v. Berty 1 P. Wms. 703. But in this country equity has sometimes exerted its jurisdiction to withdraw an infant from improper influences, even when not possessed of an estate. Finley v. Finley, 2 S. W. Rep. 554; State v. Griggsby, 38 Ark. 406.

As to the father's custody of a motherless child it has been generally held, as in the principal case, that it will be more conducive to the welfare of a young child to remain in the care of its maternal grandparents, who have had it since the mother's death and have a suitable home and means to raise and educate it and are competent to care for it, than to be awarded to the father, though of good character and possessed of ample means to educate and provide for it. Sturtevant v. State, 15 Neb. 459, 48 Am. Rep. 349. See Jones v. Darnall, 103, Ind. 529, 53 Am. Rep. 543; *Ex parte* Murphy, 75 Ala. 409; Verser v. Ford, 37 Ark. 27.

But where the child had reached the age of four years, and the means of the grandparents were somewhat precarious, having been eked by the father's contributions for the support of his child, while the father on the other hand was in receipt of a fixed salary as a railway mail clerk and lived with his mother and sister, the court declined to deprive him of the custody of the child, which he had secured by strategem, and award it to the grandparents. Miller v. Wallace, 76 Ga. 479.

In these cases, the possession, by the person seeking the custody of the infant, of sufficient means to provide a home and properly maintain and educate it, is an important though not controlling consideration. *Ex parte* Bulleen, 28 Kan. 781; State v. Baird, 21 N. J. Eq. 384, 18 N. J. Eq. 195; *Re* Beckwith, 23 Pac. Rep. 1644, 3 Kan. 159; Williams v. Williams, 2 South. Rep. 768, 23 Fla. 324; Finley v. Finley, 2 S. W. Rep. 554; Bonney v. Bonney, 3 S. W. Rep. 171; Lyle v. Lyle, 6 S. W. Rep. 878; Ahrenfeldt v. Ahrenfeldt, Hoff. Ch. 497; People v. Gates, 43 N. Y. 40; Paddock v. Eager, 10 N. Y. Supp. 710; Hoxie v. Potter, 17 Atl. Rep. 128; Bonnett v. Bonnett, 61 Iowa, 199. But the court will not sit in judgment on the question whether a wealthy stranger cannot give the child more worldly advantages than an indigent father, nor encourage the infant to abandon the filial duty of assisting its parent (Moore v. Christian, 56 Miss. 408), nor permit the child to be estranged from his father simply because of the latter's poverty. Henson v. Watts, 40 Ind. 170. Where, however, a parent has permitted his child to remain in the custody of others for years and to be reared in a home of wealth and refinement, where it may have a reasonable expectation of a permanent provision in life, the court will not permit him, by asserting his parental right, to disappoint these expectations and sever the ties of affection which have grown up between his child and its protectors, especially if he is not in a position to make equally as desirable provision for it. Paddock v. Eager, 10 N. Y. Supp. 710; Hoxie v. Potter, 17 Atl. Rep. 128; Bonnett v. Bonnett, 61 Iowa, 199; People v. Gates, 43 N. Y. 40.

It follows, from the doctrine that the father's right of custody is rather a duty or trust to be exercised for the benefit of the child, that the father cannot make a valid and binding contract surrendering it to a third person. And yet agreements which purport to have that effect are frequently made. Nor are they to be entirely ignored by the courts in passing upon such questions. They are to be considered, not for the purpose of fixing the rights of the parties, but of shedding light upon their actual relations and feelings toward the infant, and of assisting the court in the exercise of its discretionary power. Weis v. Marley, 12 S. W. Rep. 798, 99 Mo. 484; Matter of McDowles, 8 Johns. 328; Kerwin v. Wright, 59 Ind. 369; Com. v. Dougherty, 1 Leg. Gaz. R. 63; *Re* Scarritt, 76 Mo. 565, 43 Am. Rep. 768.

WM. L. MURFREE, JR.

BOOKS RECEIVED.

A TREATISE ON THE LAW OF CHATTEL MORTGAGES. By Darius H. Pingrey, of the Illinois Bar. Jersey City, N. J.: Frederick D. Linn & Co., Law Publishers and Booksellers. 1891.

ABRIDGEMENT OF ELEMENTARY LAW: Embodying the General Principles, Rules and Definitions of the Law, together with the Maxims and Rules of Equity Jurisprudence of the Leading English and American Authors; Embracing the Subjects contained in a Regular Law Course. Collected and arranged so as to be more easily acquired by Students, comprehended by Justices, and readily received by Young Practitioners. By M. E. Dunlap, Counselor at Law. Enlarged Edition. St. Louis: The F. H. Thomas Law Book Co. 1892.

A TREATISE ON THE LAW OF PRIVATE CORPORATIONS, Divided with respect to Rights pertaining to the Corporate Entity as well as those of the Corporate Interests of Members, Remedies for the enforcement and protection of these Rights and Interests, and Legislation amending and repealing Charters, regulating Rates and conduct of Business, and taxing Stock, Franchises and other Corporate Property. Containing a full and complete exposition of Principles, both ancient and recently developed, with reference to Authorities in England and all the States down to date of publication. By T. Carl Spelling, of the San Francisco Bar. Vols. I and II. New York: L. K. Strouse & Co., Law Publishers. 1892.

HUMORS OF THE LAW.

CURIOUS CORONERS' VERDICT

"Calded on the left side by a kittley of hot water burning over on hir side and immediately causing hir death."

"From the effect of injuries received by her close accidental taking fire."

"From exposier."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT STATED — Limitations. — When accounts between factor and planter have been repeatedly rendered to the latter, and have been received without objection, and with petitions for indulgence and promises to pay, he cannot afterwards question the correctness of the items thereof, or of the charges of interest therein contained.—*Flower v. O'Bannon*, La., 10 South. Rep. 376.

2. ADMINISTRATION — Claims against Decedents. — A claim by a vendee of land against the estate of a deceased vendor for breach of warranty, stating that at the time of the execution of the deed there was a valid mortgage on the land, which the vendee has had to pay, is insufficient, where it fails to describe the deed, or state where or by whom it was executed, or whether it was recorded.—*Worley v. Hineman*, Ind., 29 N. E. Rep. 570.

3. ADMINISTRATION—Claims against Decedent's Estate. —Where the notice required creditors to present their claims against an estate at a certain attorney's office, a claim left with the clerk of the attorney for the attorney for the administratrix on the day specified was a valid presentation of the claim.—*Roddan v. Doane*, Cal., 28 Pac. Rep. 604.

4. ADULTERATION — Milk.—St. 1886, ch. 318, § 2, which imposes a fine on whoever, by himself or his servant, sells milk during May and June containing less than 12 per centum of milk solids, applies to the sale of a glass of milk in a *cafe*, to be drunk on the premises, made by a servant in the ordinary course of his employment, though the master was not present, and did not know of the particular sale.—*Commonwealth v. Vieth*, Mass., 29 N. E. Rep. 578.

5. APPEAL — Transcript of Justice.—In appeals from justice court judgments the appellate court must learn the *status* of the case from the transcript and papers transmitted by the justice. If such transcript is imperfect or insufficient, a further return may be required by the appellate court, but affidavits of parties cannot be used to supply what should but does not appear in the justice's transcript.—*Mouser v. Palmer*, S. Dak., 50 N. W. Rep. 967.

6. APPEAL-BOND—Discharge of Surety.—Where a judgment from which an appeal is taken is reversed as to a part of the appellees, the surety on the appeal-bond is discharged.—*Blair v. Sanborn*, Tex., 18 S. W. Rep. 159.

7. ASSIGNMENT BY MARRIED WOMAN.—Under the insolvent law of 1881 a married woman can make a valid assignment of all her unexempt property, including real estate, for the benefit of creditors, without her husband joining in its execution.—*Kinney v. Sharvey*, Minn., 50 N. W. Rep. 1025.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Mortgage. —Where a deed of assignment and certain mortgages were in contemplation at the same time, and the preparation of all commenced and proceeded together, and all were executed and completed substantially at the same time, the preparation and execution of all must be treated as a simultaneous, continuous, and single act, and no preference can be rightfully claimed under the mortgages.—*Watkins Nat. Bank v. Sands*, Kan., 28 Pac. Rep. 618.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS—Construction of Statute.—Code Iowa, § 2115, providing that no general assignment for the benefit of creditors shall be valid unless made for the benefit of all creditors in proportion to their respective claims, does not prevent partial assignments with preferences, or sales or mortgages of any or all of the debtor's property in payment or security for indebtedness. Its operation is limited to general assignments, and does not destroy the *jus disponendi* which is incident to title.—*South Branch Lumber Co. v. Ott*, U. S. S. C., 12 S. C. Rep. 318.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS—Partnership and Individual Property.—Sayles' Civil St. Tex. p. 61, art. 65*a*, provides that every assignment for the benefit of creditors shall provide for the distribution of all the debtor's real and personal property, other than that which is exempt by law from execution, among all his creditors, in proportion to their claims, and shall have that effect, "however made or expressed," and "shall be construed to pass all such estate, whether specified therein or not.": *Held* that, when an assignment by a firm purports to convey firm property only, the statute does not act upon it so as to carry the title to individual property of the members; and hence such an assignment is void as to creditors who do not accept it, and the property is subject to attachment by them.—*Kennedy v. McKee*, U. S. S. C., 12 S. C. Rep. 303.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—Under Sayles' Civil St. arts. 65*a*, 65*c*, 65*s*, providing for assignment for the benefit of creditors, an instrument of conveyance, without defeasance, by an insolvent of all his property subject to forced sale for the benefit of his creditors, but preferring some, and exacting releases of certain others, is void as to the preferred creditors and those from whom releases were exacted, but in other respects is valid, and the assignee acquired title under its provisions, to be distributed pursuant to said statute.—*Boyd v. Haynie*, Tex., 18 S. W. Rep. 156.

12. ATTACHMENT — Action for Damages.—In order to maintain an attachment there must be some proof at the time the writ issued the defendant had done or was about to do the act charged. The intent must also exist to defraud or to give an unfair preference. But this intent can only be proved by the acts of the defendant and the conclusions to be drawn from them.—*Chaffe v. Mackenzie*, La., 10 South. Rep. 369.

13. ATTACHMENT—Action on Bond.—In complaint in an action on a bond in attachment, sued out for the collection of rent the allegation that "said attachment was wrongfully, vexatiously, and ma-

liciously sued out, in that no statutory ground existed either for the enforcement of any existing lien or for the purpose of creating a lien," was sufficient to support a recovery of actual damages, but did not authorize vindictive damages.—*Crofford v. Vassar*, Ala., 10 South. Rep. 35o.

14. ATTORNEY AND CLIENT—Compensation.—The fact that an attorney at aw has loaned money for his principal on mortgage security, and has foreclosed the mortgage and purchased the realty in his principal's name, and the principal has refused to pay his fees until he shall realize them out of a sale of the property, gives him no authority to bind his principal by a contract to sell the same.—*Sculley v. Book*, Wash., 28 Pac. Rep. 556.

15. BANKS — Insolvency—County Deposits.—A treasurer, being authorized by the supervisors, deposited county money in a private bank, which soon afterwards made an assignment. Plaintiffs, who were sureties on the bond given by the bank, paid the amount deposited, and brought an action against the assignee to recover the money on the ground that it was a trust fund: *Held*, that the statute did not limit the treasurer to "special" deposits, and that the money lost its trust character when deposited.—*Cadwell v. King*, Iowa, 50 N. W. Rep. 975.

16. BANKS AND BANKING—Drafts—Collections.—Where time drafts were left with a bank for collection, with bills of lading attached, the burden is on the drawer to show that the bank was instructed to hold the bills of lading until the drafts should be paid.—*Second Nat. Bank of Columbia v. Cummings*, Tenn., 18 S. W. Rep. 115.

17. CARRIERS — Passengers—Negligence.—If the negligence of a carrier place a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought.—*Purcell v. St. Paul City Ry. Co.*, Minn., 50 N. W. Rep. 1034.

18. CARRIERS —Passengers—Negligence.—A passenger on a railroad train which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door: *Held*, in an action for such injury, that the passenger's negligence precluded his recovery.—*Texas & P. Ry. Co. v. Overall*, Tex., 18 S. W. Rep. 142.

19. CARRIERS OF PASSENGERS—Ejection of Passengers —Damages.—Where a passenger on a railway train, who holds a ticket entitling him to ride, is wrongfully expelled from the train by the conductor before reaching his destination, the indignity of being expelled, and injury to health caused by exposure to the weather, if the proximate and natural consequence of the expulsion, are proper elements of compensatory damages.—*Serwe v. Northern Pac. R. Co.*, Minn., 50 N. W. Rep. 1021.

20. CHAMPERTY. — While a champertous agreement between a plaintiff and his attorney for the prosecution of a certain suit is against public policy and void, it does not affect the right of the plaintiff to prosecute his action against the defendant in the suit for the prosecution of which the champertous agreement was made. —*Pennsylvania Co. v. Lombardo*, Ohio, 29 N. E. Rep. 573.

21. CHATTEL MORTGAGES — Estoppel. — In a chattel mortgage, the clause, "free from all incumbrances of any kind except a seed-grain note on said crop for $27,'' does not estop the mortgagee to deny the existence or validity of such note.—*O'Brien v. Findeisen*, Minn., 50 N. W. Rep. 1035.

22. CHATTEL MORTGAGE — Sales by Mortgagor. —An agreement between the mortgagor and mortgagee of a stock of goods, made at the time the mortgage was given, to the effect that the mortgagor, remaining in possession, might sell the goods in his usual course of business, accounting to the mortgagee for the proceeds, is, when followed by sales by the mortgagor in pursuance thereof, sufficient to render the mortgage fraudulent as to his creditors.—*William Deering & Co. v. Washburn*, Ill., 29 N. E. Rep. 558.

23. CHINESE RESTRICTION ACT—Imprisonment.—Under Act Cong. Sept. 13, 1888, which provides that any Chinese person found in the United States may be brought before a commissioner, and, when adjudged not entitled to be or remain in the United States, shall be removed to the country whence he came, and Rev. St. U. S. § 787, which authorizes a marshall to execute process in the district wherein he was appointed, a Chinaman could not be lawfully imprisoned in a county jail in the northern district of the State by a deputy-marshal of the southern district on a finding of a United States court commissioner of the latter district, which, after reciting certain facts, declared that "now, therefore, from the foregoing facts, I find that the said" Chinaman "was found unlawfully within the United States, and that he is not lawfully entitled to be in or remain" therein.—*People v. Ah Teung*, Cal., 28 Pac. Rep. 577.

24. CONDITIONAL SALE — Where plaintiff sells and delivers chattels under a contract providing that the title shall not pass until the agreed price is paid, and that he may reclaim possession in default of payment, he may, on the purchaser's failure to pay, elect to reclaim possession or enforce payment of the price.—*Bensinger Self-Adding Cash Register Co. v. Cain*, Tex., 18 S. W. Rep. 136.

25. CONDITIONAL SALES — Possession — Peplevin. — Where a machine is sold on installments, the title to remain in the vendor until full payment of the price, though the contract is silent in respect to possession, the vendee's right thereto depends on his payments as provided, and on default the vendor may recover possession.—*Wiggins v. Snow*, Mich., 50 N. W. Rep. 991.

26. CONSTITUTIONAL LAW — Habitual Criminals. — St. 1887, ch. 435, provides that "whoever has been twice convicted of crime, sentenced, and committed to prison' in this or any other State, or once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the State prison for twenty-five years," etc.: *Held*, that the statute is not retrospective, nor *ex post facto* as to convictions prior to its passage, since a criminal cannot be punished under it without conviction of a felony committed after its passage, and with a presumed knowledge of the statute.—*Commonwealth v. Graves*, Mass., 29 N. E. Rep. 579.

27. CONSTITUTIONAL LAW—Special Acts.—The constitutional inhibition against special legislation does not prevent classification, but such classification must be natural, not arbitrary; it must stand upon some reason having regard to the character of the legislation of which it is a feature.—*Edmonds v. Herbrandson*, N. Dak., 50 N. W. Rep. 970.

28. CONTRACT — Assignment.—A contract between a city and a corporation, "its successors and assigns," for erecting water-works and furnishing water to the city, is assignable by the corporation. Where the city, after notice of the assignment, recognizes the assignee as the contracting party, the assignee may sue the city on the contract in its own name. 36 Ill. App. 28, affirmed. —*Carlyle Water, Light & Power Co. v. City of Carlyle*, Ill., 29 N. E. Rep. 556.

29. CONTRACT—Rescission.—In the case of an executory contract for the sale of goods to be paid for after delivery, if during the time for delivery the buyer notifies the seller that he will not pay the contract price for the goods, but only a less price, the seller has a right to act on this as a repudiation of the contract, and stop delivery; and, if thus acted on, he has his action for damages.—*Armstrong v. St. Paul & Pac. Coal Co.*, Minn., 50 N. W. Rep. 1029.

30. CORPORATIONS—Posting Accounts.—The directors of a corporation formed for the purpose of mining, which chooses officers, disburses money, incurs liabilities, etc., must make and post the itemized accounts required by this statute, although they never carried

on or conducted the business for which they were formed.—*Francais v. Somps*, Cal., 28 Pac. Rep. 592.

31. CORPORATIONS—Stockholder.—Certain by-laws of a corporation held to be *ultra vires*. Mere failure of a stockholder to object to void by-laws until an attempt is made to enforce them against him does not estop him to object to them.—*Kolff & St. Paul Fuel Exchange*, Minn., 50 N. W. Rep. 1036.

32. COUNTER-CLAIM — Damages. — Where a plaintiff sues a railroad company for services as an engineer, defendant can plead a counter-claim for damages resulting from plaintiff's negligence in running defendant's train, under Rev. St. art. 650, allowing a counter claim to be pleaded where it is founded on a cause of action arising out of, incident to, or connected with plaintiff's cause of action.—*Scott v. Mexican Nat. R. Co.*, Tex., 18 S. W. Rep. 137.

33. CRIMINAL EVIDENCE—Homicide.—For the purpose of showing malice on the part of defendant, it may be shown in a general way that he and the deceased had previous difficulties, although such difficulties cannot be examined in detail, for the purpose of seeing which party was in the wrong.—*People v. Thomson*, Cal., 28 Pac. Rep. 589.

34. CRIMINAL LAW—Forgery.—Where all the evidence against defendant on trial for forgery was given by an expert on handwriting, who by a comparison with the genuine writing of defendant testified that in his opinion the face of the check was written by defendant, such evidence is insufficient to sustain a conviction, even if the words "face of the check" included the signature.—*People v. Mitchell*, Cal., 28 Pac. Rep. 597.

35. CRIMINAL LAW—Homicide.—The court, in a murder trial, charged that "the term 'malice,' as used in its legal sense, means the willful and intentional doing of a wrongful act without legal justification or excuse, and is a state or condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken:" *Held*, a sufficient definition of "malice."—*Ellis v. State*, Tex., 18 S. W. Rep. 139.

36. CRIMINAL LAW—Presumption of Innocence.—It is the duty of the court in a criminal prosecution to inform the jury that the law presumes every man innocent until proven guilty, and this duty obtains in cases of misdemeanor where intent is not an element of the crime, as well as in all other cases.—*People v. Potter*, Mich., 50 N. W. Rep. 994.

37. CRIMINAL PRACTICE—Alteration of Indictment.—In a trial for robbery the information was against defendants "and John Murphy," but was withdrawn against Murphy, and some one connected with the court, after arraignment and before trial, erased the words "and John Murphy" by drawing a black-ink line through them. Defendants were convicted: *Held*, that while the act of erasing was unauthorized, yet, as it did not prejudice defendants, it was not ground for reversal.—*People v. Carroll*, Cal., 28 Pac. Rep. 600.

38. CRIMINAL TRIAL — Exclusion of Public. — Under Const. art. 6, § 28, which declares, "In every criminal prosecution the accused shall have the right of a speedy and public trial;" and How. St. § 7244, which provides that "the sittings of every court within this State shall be public,"—it was error for the court, where one was on trial for murder, to order the officers to exclude all from the court-room except "respectable citizens."—*People v. Murray*, Mich., 50 N. W. Rep. 995.

39. CRIMINAL TRIAL—Instructions.—An instruction by the court in the trial of a case of larceny that the issue was not whether a verdict would be a victory for or against a corporation, but whether the accused was guilty, was not a charge upon the facts. It only cautioned the jury to direct their attention to the real issue, which the line of argument might otherwise becloud.—*State v. West*, La., 10 South. Rep. 364.

40. DEED — Construction.— The grantor, in consideration of the grantee becoming his wife, delivered to her a deed, before marriage, for certain real estate. The deed reserved a life estate in the grantor, and an estate in reversion in case he survived the grantee, and further stipulated that the "grantee shall have the right to use and dispose of the said premises, for her comfortable support, in case of my death, and, in case there is any portion of said estate remaining at her death, such remainder shall go to" W. The grantee survived the grantor: *Held*, that she took a life-estate.—*West v. West*, Mass., 29 N. E. Rep. 582.

41. FIXTURES AS BETWEEN MORTGAGOR AND MORTGAGEE.—*Held* that, as between mortgagor and mortgagee, a "bar," fastened by nails and screws to the wall and floor of a building used by the mortgagor as a saloon was a part of the realty, and passed by the mortgage —*Woodham v. First Nat. Bank*, Minn., 50 N. W. Rep. 1015.

42. FRAUDS, STATUTE OF—Guaranty.—The guaranty of the debt of another, assigned at the same time by the guarantor, when the purpose is to thereby pay or satisfy a claim of the guarantee against the guarantor, is not within the statute of frauds.—*Crane v. Wheeler*, Minn., 50 N. W. Rep. 1033.

43. FRAUDULENT CONVEYANCES. — When a creditor purchases from an insolvent debtor his entire stock of goods, the consideration being the extinguishment of a pre-existing debt materially less in amount than the value of the goods, the sale is fraudulent as against attaching creditors.—*Moore v. Penn*, Ala., 10 South. Rep. 343.

44. FRAUDULENT CONVEYANCES — Evidence.—A deed will not be set aside as in fraud of creditors where the only evidence of fraud was that five years after the conveyance an execution against defendant was returned unsatisfied; there being no evidence of his financial condition at the time of the conveyance.—*Windhaus v. Bootz*, Cal., 28 Pac. Rep. 557.

45. FRAUDULENT CONVEYANCES—Husband and Wife.—In an action by judgment creditors to set aside as fraudulent a conveyance by a husband to his wife, the wife cannot, under a general denial, dispute the indebtedness on which the judgment was based.—*Shaw v. Manchester*, Iowa, 50 N. W. Rep. 985.

46. FRAUDULENT CONVEYANCES—Knowledge of Grantee. — Where one purchases property from a debtor, whom he knows is insolvent, with notice that his object in selling it was to deprive his creditors of their recourse upon it, and such purchase operates to their injury, the sale will be annulled.—*Chaffe v. Gill*, La., 10 South. Rep. 361.

47. GUARANTY OF NOTE — Exhausting Securities. — Where one assigns a note, which is secured by mortgage, guarantying its collection, and at the same time, and as part of the same transaction, also assigns the mortgage, he is not liable upon the guaranty until resort has been had to the mortgage security.—*Dewey v. W. B. Clark Inv. Co.*, Minn., 50 N. W. Rep. 1032.

48. HIGHWAYS—Petition.—A petition for the opening of a highway under Rev. St. 1881, §§ 5001, 5015, is sufficient to give jurisdiction if it makes either the owner, occupant, or agent a party thereto; and a complaint in an action to enjoin the opening of a road through plaintiff's land, on the ground of want of jurisdiction in the road proceedings because plaintiff was not made a party, which does not negative the fact that the occupant of the land was made a party to the proceedings, is demurrable.— *Ryder v. Norsting*, Ind., 29 N. E. Rep. 567.

49. HOMESTEAD—Conveyance.—Except for taxes, purchase money, and improvements, no alienation of the homestead of a husband and wife can be effected, nor any lien or incumbrance placed thereon, except by the joint consent of the husband and wife.—*Hofman v. Hill*, Kan., 28 Pac. Rep. 623.

50. HOMESTEAD — Exemption — Urban Residence.—A residence on a lot of about seven acres, half a mile within the city limits, and cut up into city lots which were for sale, is an urban residence.—*Allen v. Whitaker*, Tex., 18 S. W. Rep. 160.

51. HOMESTEAD—Extent of Right.—Under the home-

stead exemption laws of this State, the homestead must consist of one body of land. A person residing upon one 40-acre tract of land, and owning a second, upon which he does not reside, and which only corners with the first, cannot hold the second 40 exempt as a homestead.—*Linn County Bank v. Hopkins*, Kan., 28 Pac. Rep. 606.

52. INSOLVENCY—Preferences—Collusive Judgment.—A judgment obtained by a creditor against an insolvent debtor in contemplation of insolvency, under a collusive understanding between them that the creditor shall thereby obtain a preference over other creditors, is a "security given" with intent to give a preference, within the meaning of section 4 of the insolvent act of 1881.—*Wright v. Fergus Falls Nat. Bank*, Minn., 50 N. W. Rep. 1030.

53. INSURANCE—Title to Premises.—Where an applicant for insurance represented that he owned the premises in fee, his recovery will not be defeated by proof that he has no written evidence of title, since an equitable title is a sufficient stimulus to the preservation of the property.—*Capital City Ins. Co. v. Caldwell*, Ala., 10 South. Rep. 355.

54. INSURANCE COMPANIES.—The respondent corporation *held* not to be a life, endowment or casualty insurance company, and hence not subject to the provisions of chapter 184, Laws 1885.—*State v. Federal Investment Co.*, Minn., 50 N. W. Rep. 1028.

55. JUDGMENT—Publication—Fraud.—Under Code Civil Proc. § 412, a judgment by default, quieting title to land in plaintiff, will be set aside by a court of equity, though the action is not brought till more than a year later, where defendant had no actual notice, and plaintiff had no title to the land, and knew that his affidavit, upon which service by publication was ordered, was false.—*Dunlap v. Steere*, Cal., 28 Pac. Rep. 563.

56. JUDGMENT—Setting Aside Default.—Under Rev. St. art. 1372, providing that a motion to set aside a judgment shall be determined at the term of court at which such motion is made, where a judgment by default is entered, and at the same term a motion, on which no action is taken by the court, is entered to set aside the default, and to reinstate the case for trial on its merits, the court cannot, at a subsequent term, set aside the default.—*Thomas v. Neel*, Tex., 18 S. W. Rep. 188.

57. JUSTICES OF THE PEACE — Jurisdiction.—Section 6042, Comp. Laws, provides that the civil jurisdiction of justices' courts within their respective counties extends "(1) to an action arising on contract for the recovery of money only when the sum claimed does not exceed one hundred dollars:" *Held*, that where, in an action commenced August 2, 1888, the sum claimed in the summons and complaint was $86.50, and interest at 7 per cent. per annum from December 22, 1883, the "sum claimed" exceeded $100, and the justice, therefore, had no jurisdiction of the case.—*Plunkett v. Evans*, S. Dak., 50 N. W. Rep. 961.

58. LEASE—Assignment.—A lessee executed an assignment of the lease, and gave it to the lessor for his written consent, as required by the terms of the lease. The lessor refused to consent to the assignment, and retained possession of it, so that it was never delivered to the assignee: *Held*, that there was no breach of the covenant against assigning, and the leasehold was subject to execution against the lessee.—*Farnum v. Hefner*, Cal., 28 Pac. Rep. 602.

59. LEASE—Repairs.—Under Civil Code, § 1941, requiring the lessor to put buildings intended for human occupation in a condition fit for occupancy, and section 1942, providing that the lessee, after notice to the landlord of dilapidations, may either repair at the expense of the landlord or vacate the premises, a lessee of a dwelling who discovers the premises to be in an untenantable condition cannot abandon the premises, so as to relieve himself from liability on the lease, without notice to the landlord to repair, where the lease was executed by both parties in good faith.—*Green v. Redding*, Cal., 28 Pac. Rep. 599.

60. MANDAMUS—Justices of the Peace.—Where a justice refused to proceed with the trial of a cause pursuant to Code Civil Proc. § 873, which provides that the trial must commence within one hour from the time fixed therefor, and continues the same, the remedy was by *mandamus* to proceed with the trial, rather than to dismiss the action.—*Whaley v. King*, Cal., 28 Pac. Rep. 579.

61. MARRIED WOMAN—Mechanic's Lien.—Where a married woman has entered into an executory contract for the sale of real property contingent upon or providing for the erection of a building thereon, which contract is invalid and non-enforceable as contract to convey, because her husband did not join in its execution, a mechanic's lien cannot be established and enforced as against her title and interest in the premises through the provisions of section 4, ch. 200, Gen. Laws 1889.—*Althen v. Tarbox*, Minn., 50 N. W. Rep. 1018.

62. MASTER AND SERVANT—Assumption of Risk.—In an action for personal injuries received by a sailor through the use of a defective windlass, it was proper to instruct the jury that "it is a question of contract. If plaintiff knew all about the construction of the windlass and its defects when he entered the employment, he took the risk of the business in that way, and he cannot claim damage of defendant for defects he knew all about; and the jury are to determine what knowledge of such defects plaintiff had."—*Anderson v. Clark*, Mass., 29 N. E. Rep. 589.

63. MASTER AND SERVANT—Defective Appliances.—It is not negligence *per se* for a railroad company to adopt a device for coupling cars, not before in use on its road, without discarding those already in use, by it, although the use of the two together may be more hazardous than would the use of either alone.—*Pittsburg & L. E. R. Co. v. Henly*, Ohio, 29 N. E. Rep. 575.

64. MASTER AND SERVANT—Negligence.—Where plaintiff's decedent was killed by the falling of a roof while being raised by defendant, by whom he was employed, and there was no evidence of decedent's negligence, nor of the cause of the falling of the roof, the fact that the roof fell was sufficient evidence of defendant's negligence in executing the work to go to the jury.—*Barnowski v. Helson*, Mich., 50 N. W. Rep. 989.

65. MASTER'S REPORT — Findings — Review—Fraud — Corporations—Payment for Stock.—Where a case is referred to a master to take proofs and report the same with his findings thereon, the chancellor, on exceptions being made by one of the parties to the master's report, may refuse to give any weight to the findings of fact by the master, and may consider the testimony as though originally heard by himself.—*Medler v. Albuquerque Hotel & Opera House Co.*, N. Mex., 28 Pac. Rep. 551.

66. FAILURE TO RELEASE—Damages.—Where a chattel mortgage is paid in full it is the duty of the mortgagee or his agent to release the same—acknowledge satisfaction of the debt in the proper office; and, if such release is delayed for an unreasonable time, and damage thereby ensues to the mortgagor, he may recover the same by action, but only such damages can be recovered as naturally result from the wrong complained of.—*The William Deering Co. v. Miller*, Neb., 50 N. W. Rep. 1056.

67. MORTGAGE—Foreclosure.—Where land subject to two mortgages is sold on foreclosure of the senior mortgage, and bid in by the senior mortgagee, and the junior mortgagee, within the time allowed him by statute for redemption, pays the senior mortgagee the amount of his bid, and takes him from an assignment of the certificate of purchase, and afterwards attempts by suit to assert his right as an assignee of the certificate, he cannot afterwards claim that the transaction was in fact a redemption.—*Shroeder v. Bauer*, Ill., 29 N. E. Rep. 560.

68. MORTGAGE—Foreclosure.—Where, on foreclosure of a senior mortgage, the mortgaged property is bid in by the senior mortgagee for less than the mortgage debt, a statutory redemption by a junior mortgagee gives such junior mortgagee a first lien on the land,

regardless of the balance still due the senior mortgagee since by the foreclosure the lien of the senior mortgage is extinguished.—*Ogle v. Koerner*, Ill., 29 N. E. Rep. 563.

69. MUNICIPAL CORPORATION — Railroad Aid Bonds.— Under the provision of the constitution of 1870 forbidding municipal aid to corporations, except in cases where such aid had been "authorized under existing laws by a vote of the people of such municipalities prior to adoption" of the constitution, county bonds thereafter issued and donated to a railroad company are void, where the only aid authorized by popular vote was a subscription to the company's stock, to be paid for in bonds.—*Choisser v. People*, Ill., 29 N. E. Rep. 546.

70. MUTUAL BENEFIT INSURANCE —Waiver. — By accepting and retaining the dues or fees of an applicant for a beneficiary certificate, with knowledge of the facts, the defendant waived all irregularities in the organization of the subordinate lodge and in the admission of the applicant to its membership. — *Perine v. Grand Lodge of Ancient Order United Workmen*, Minn., 50 N. W. Rep. 1022.

71. NEGLIGENCE—Assumption of Risk.—Where an experienced switchman, having charge of the engine and its movements, undertook without objection, to couple a flat car, with its load projecting over the end to a box-car, knowing the dangerous way in which it was loaded, he assumed the risk of the undertaking.—*Mexican Cent. Ry. Co. v. Shean*, Tex., 18 S. W. Rep. 151.

72. NEGLIGENCE—Contributory Negligence.—Where a brakeman's duty was to catch cars and set the brake after they were kicked in upon a side track, without having time to examine them to see whether they were properly loaded, he was not guilty of contributory negligence in failing to see that his way was obstructed before it became necessary to set the brake.—*Irvine v. Flint & P. M. R. Co.*, Mich., 50 N. W. Rep. 1008.

73. NEGLIGENCE—Expert Testimony.—The opinion of experts as to whether a certain arrangement of machinery was dangerous cannot be received in evidence, where the facts are such that, when placed before a jury and explained to them, they are as competent as the witnesses to form an opinion as to whether or not it was safe. — *Freeberg v. St. Paul Plow-Works*, Minn., 50 N. W. Rep. 1026.

74. NEGLIGENCE — Master and Servant.—Where one hires a hack to convey him to and from a funeral, and the hack is driven by a hackman who is employed by the owner, and is not controlled by the passenger, the negligence of the hackman is not imputable to the passenger, since the hackman is not his servant. — *Randolph v. O'Riorden*, Mass., 29 N. E. Rep. 583.

75. NEGLIGENCE OF COUNTY— Unhealthy Jail.—A person confined for nearly four months in a county jail under an indictment for forgery, which was then dismissed, cannot recover from the county for injuries to his health, caused by the negligent failure of the board of supervisors to keep the jail in a healthy condition.—*Lindley v. Polk County*, Iowa, 51 N. W. Rep. 975.

76. NEGOTIABLE INSTRUMENT — Pleading. — Though each paragraph of a complaint must be independent, yet an allegation in one paragraph, that a note sued on was signed as stated in prior paragraph, is immaterial, and will be treated as surplusage, where a copy of the note is filed with the complaint.—*Jaqua v. Woodbury*, Ind., 29 N. E. Rep. 573.

77. NEGOTIABLE INSTRUMENT — Protest. — Under the provision of section 8, ch. 41, Comp St., legal holidays and Sundays are grouped together, so far "as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor, of bills of exchange, bank checks, or promissory notes," and, where the third day of grace falls on Sunday, presentment or demand on the following Monday will be sufficient.—*First Nat. Bank of Hastings v. McAllister*, Neb., 50 N. W. Rep. 1040.

78. PARTY-WALLS. — Where an adjoining owner constructs a wall against a party-wall, but does not attach it thereto, and the party-wall is not necessary for its support, the fact that he relies upon the party-wall for protection, and so constructs his own of poorer materials than are generally used for outside work, does not show such a "use" of the said wall as to render him liable for one-half of its value under the provision of Code, § 2019.—*Sheldon Bank v. Royce*, Iowa, 50 N. W. Rep. 986.

79. PHYSICIANS AND SURGEONS— Negligence.— Where, in an action for services for surgical operations on the defendant's wife, the defendant seeks to hold plaintiff responsible for the negligence of nurses in the hospital where defendant's wife was attended after the operation, it is competent to show that the plaintiff had no control over the hospital, and that it was in charge of others.—*Baker v. Wentworth*, Mass., 29 N. E. Rep. 589.

80. PRACTICE — Cancellation of Stipulation.— Where defendant, in an action on a note, agreed to a judgment for plaintiff, and on the same day applied to have the agreement set aside, and be allowed to answer, tendering a valid defense supported by affidavit, and alleged that the agreement was made under a mistake in fact, he believing at the time it was made that plaintiff was an innocent holder on the note, the refusal to entertain such application was error.—*Paschall v. Penry*, Tex., 18 S. W. Rep. 184.

81. PRINCIPAL AND SURETY — Appeal Bond—Delivery. —The delivery of a statutory bond may (in the absence of affirmative statutory words in effect declaring the unapproved instrument a nullity) be sufficiently complete without the official approval to bind the sureties, where the officer has entered upon the discharge of his duties to the public, or where the obligee has, in words or by conduct, indicated his satisfaction therewith, and through reliance thereon has placed himself in a less favorable attitude. — *Erwin v. Crook*, Colo., 28 Pac. Rep. 549.

82. PROCESS— Service of Writ.— Service of summons upon a husband alone is not good service on the wife, even if he is served with two copies thereof, one being designed for the wife. — *Holliday v. Brown*, Neb., 50 N. W. Rep. 1042.

83. PUBLIC LANDS — Contracts. — Where C makes a homestead entry on public land, pays the entrance fee, and then abandons the entry, but an act of congress permits him to purchase the land at $1. 25 per acre, less the entrance fee, a contract whereby M agrees to furnish the money, and C agrees to purchase the land and convey it to M, does not violate any statute or the public policy of the federal government.— *Mulloy v. Cook*, Ala., 10 South. Rep. 349.

84. RES JUDICATA— Merger.— An action instituted in another State to have certain conveyances set aside, and subject the property described therein to the payment of the plaintiff's judgment and the claims of all other creditors who might come in and set up their demands, is not a bar to an action brought by one of such creditors in this State upon a promissory note owned by him, notwithstanding the fact that he appeared in the former action, filed a cross-petition, and obtained a finding from the court of the amount due him upon his note, but did not obtain a personal judgment against the defendantin that action, nor receive anything from the sale of the property affected by such proceedings. — *Cackley v. Smith*, Kan., 28 Pac. Rep. 617.

85. SHERIFFS—Deputy.— Under Crim. Code, § 3951, imposing a penalty on an officer required by law to take an oath of office, who enters on the duties of his office without taking and filing such oath in the proper office, a sheriff is not relieved of his liability for the acts of a deputy because such deputy filed his oath of office with the clerk of court instead of the probate office.—*Mathis v. Carpenter*, Ala., 10 South. Rep. 341.

86. SHERIFFS—Failure to Pay Moneys Collected. — A constable, under a judgment recovered before a justice of the peace, levied execution on personal property subject to two attachments in the hands of a

sheriff. The constable did not take possession of the property, the sheriff agreeing that the execution held by the constable should be third in point of levy. The property was sold for more than enough to pay the three claims, but the sheriff levied other attachments from the circuit court thereon: *Held*, that the court had no authority by statute, on motion of the owner of the judgment recovered before the justice, to order the sheriff to pay over the amount of such judgment.—*Chandler v. Vandegrift Shoe Co.*, Ala., 10 South. Rep. 353.

87. SPECIFIC PERFORMANCE — Laches. — In an action for specific performance of a contract to sell land, where defendant neither pleaded nor attempted to prove a demand for the purchase money, and did not allege that the contract had been rescinded, a demurrer to a plea setting up laches on part of plaintiff for a shorter period than that prescribed by Rev. St. art. 3209, as a bar to the action, and the increased value of the land, was properly sustained. — *Riley v. McNamara*, Tex., 18 S. W. Rep. 141.

88. SURVIVAL OF ACTION.—Where a defendant in ejectment died after executing an undertaking on appeal, pursuant to Code Civil Proc. § 945, that, if the judgment be affirmed, or the appeal dismissed, he would pay the value of the use and occupation of the premises pending the appeal, the right of action for such use and occupation survived against his estate, to be collected from it as any other claim, or from the sureties on the undertaking, and not against the administrator personally, who collected rents of the premises.—*Shepperd v. Tyler*, Cal., 28 Pac. Rep. 601.

89. TAXATION—Exemption.—Under Pub. St. ch. 11, § 5, cl. 3, which provides that the personal property of literary, benevolent, charitable, and scientific institutions, and the real property occupied by them or their officers for the purposes for which they were incorporated, shall be exempt from taxation, property held by such an institution merely in trust for an object other than that for which it was incorporated is not exempt. —*Salem Marine Soc. v. City of Salem*, Mass., 29 N. E. Rep. 584.

90. TAX DEED — Sufficiency.—Under Pol. Code, § 3776, relating to delinquent taxes, which provides that the collector must make out a certificate specifying, among other things, "the time when the purchaser will be entitled to a deed," and under section 3786, which provides that "the matters recited in the certificate of sale must be recited in the deed," a tax deed which fails to recite the time when the purchaser would become entitled to a deed is void.—*Hughes v. Cannedy*, Cal., 28 Pac. Rep. 573.

91. TAX SALES. — Where lands are sold for taxes by a county treasurer, which are not subject to taxation, the county is liable to the purchaser for the amount paid by him, with interest.—*Fuller v. Colfax County*, Neb., 50 N. W. Rep. 1044.

92. TAX TITLES.—How. St. § 1167, providing that where a tax-deed shall prove invalid for certain causes the tax lien shall remain in full force, and be transferred by such deed to the grantee, who may recover from the owner the amount of such legal taxes and all lawful charges "from the date of such sale, and also the amount of all subsequent taxes," and that "such claim shall be a lien upon such lands," etc., relates only to titles acquired after its passage and to taxes paid after the acquirement of such titles.—*Shaw v. Morley*, Mich., 50 N. W. Rep. 993.

93. TENDER — Payment into Court.—Where plaintiff elects to take and receives money paid into court by defendant on a plea of tender, judgment should be rendered against plaintiff for costs.—*Hanson v. Todd*, Ala., 10 South. Rep. 354.

94. USURY—Pleading.—An answer, in an action on a note, which alleges usury, and asks that defendant be allowed to recoup the interest he has paid on the note, but does not state how much of the note was usurious, nor the amount of the interest defendant claims to recoup, nor the particulars of the contract on which the usurious interest was included in the note, nor the quantum of usurious interest that was agreed to be paid in, is bad.—*Lockwood v. Woods*, Ind., 29 N. E. Rep. 569.

95. USURY—Sale of Personalty.—A transaction whereby a purchaser of personal property gives a mortgage on land to secure the price, payable in one year, with the maximum rate of interest, and agrees to pay fees for examining the title to the land and for preparing and recording the mortgage, will be adjudged a *bona fide* sale, and not a cloak for a usurious loan, when it does not appear that the parties considered it a loan, or that the purchaser ever applied for a loan.—*Ellenbogen v. Griffey*, Ark., 18 S. W. Rep. 126.

96. VENDOR'S LIEN.—In a suit to enforce a vendor's lien, the answer alleged that the consideration named in the deed was a gross price for the land and for certain personal property. The deed did not mention any personalty, and the vendor and one of the vendees testified that none passed, while they were contradicted by the testimony of the other vendee, by certain of his declarations, and by the testimony of a witness who swore to a declaration of the vendor that the transaction involved personalty: *Held*, that a lien for the price named in the deed would be enforced.—*Jones v. Ball*, Ala., 10 South. Rep. 349.

97. WATER-COURSES — Prescription. — Where a landmark, showing the point to which a mill-owner's deed entitles him to raise a flushing structure above his dam, has been lost, and the mill owner for 50 years, with the acquiescence of all concerned, continuously exercises the right to raise the dam to a point fixed by an experiment made by him and an adjoining proprietor, the right becomes prescriptive.—*Cornwell v. Manuf'g Co. v. Swift*, Mich., 50 N. W. Rep. 1001.

98. WATERS—Accretions.—Plaintiff was the owner of certain lands fronting on the meander line of a river. Between the meander line of plaintiff's land and the river a strip of land had been gradually added since 1860 by the action of the river. There was no evidence that the addition to plaintiff's land had been caused by a sudden disruption from the land of another which would be followed and identified: *Held*, that plaintiff was the owner of such strip, and was entitled to recover for its use and occupation.—*Coulthard v. Stevens*, Iowa, 50 N. W. Rep. 983.

99. WILLS—Equalizing Advancements. — Testator, in his life-time, made advancements to his four children, to each child a different amount, the greatest advancement being $28,000. His will directed that his executor should convert his estate into money and "equalize the shares" of his children: *Held*, the estate being sufficient for that purpose, that each child who had received an advancement less than $28,000 should receive interest from the day of testator's death on the difference between his or her advancement and that sum, up to the time of equalization.—*Clark v. Helm*, Ind., 29 N. E. Rep. 568.

100. WILLS — Opinion Evidence. — Under Code Civil Proc. § 1870, declaring that an intimate acquaintance may give in evidence his opinion respecting the mental capacity of a person, in connection with the reasons upon which it is based, the opinion of such a witness, in the contest of a will or the issue of testamentary incapacity, is admissible only as to the mental soundness of the deceased, and not as to his capacity to make the will.—*In re Taylor's Estate*, Cal., 28 Pac. Rep. 603.

101. WITNESS—Convicts.—Where notice had been given to the State of an application to produce W from the State prison to testify on behalf of defendant and it was clearly shown that his testimony was the only evidence obtainable, and would exonerate defendant, the application should have been granted.—*People v. Willard*, Cal., 28 Pac. Rep. 585.

102. WITNESS—Privileged Communications.—The fact that confidential communications by a client to an attorney were made in the presence of a third person does not qualify the attorney as a witness in regard to such communications.—*Blount v. Kimpton*, Mass., 29 N. E. Rep. 590.

ABSTRACTS OF DECISIONS OF THE MISSOURI COURTS OF APPEAL.

KANSAS CITY COURT OF APPEALS.

AFFIDAVIT FOR APPEAL—Justice Court.—Affidavit for appeal was made in conformity to section 3042 R. S. 1879, omitting the amendment made by section 6330 R. S. 1889: *Held*, that pending motion to dismiss appellant might have filed such an affidavit as required by section 6330; but, the statement required by the amendment is one of the fundamental conditions upon which an appeal is authorized, and can no more be omitted than the other essentials required by the statute to be contained in the affidavit for appeal.—*Spencer v. Beasley.*

AGENCY—Promissory Note— Payment.- In an action to cancel a note, the money having been repaid to the agent through whom it was borrowed, the note being in the hands of the principal: *Held*, agency and scope of agency are facts to be proved like other facts. When an agency is shown to exist, the presumption is the authority is general rather than limited. The principle that a party who pays money due on a written security to an agent who has not the security in his possession, pays at his risk, is not applicable where such payment can be justified, as in this case, by similar repeated acts of the agent, long continued, and acquiesced in by the principal.—*Sharp v. Knox.*

AMENDMENT—Election.—The acquiescence of a party in the action of the court striking out the second of the two counts of his petition, is tantamount to an election to stand on first count only, and he ought not, after appeal and cause remanded, to be allowed to reinstate, by amendment, the abandoned count.—*O'Riley v. Diss.*

CONTRACT—Payment by Installments.— Under a contract providing for payment by installments at stated periods, and the payments are not so made, the contractor may quit the work, and then recover of the defaulting party the amount due at the contract rate.—*Mugan v. Regan.*

CROSS JUDGMENTS— Set-off — Assignment. — If, after the right to have one judgment set-off against another has attached, under section 8168 R. S. 1889, but before motion made for that purpose, one of such judgments is assigned, the assignee stands in his assignor's shoes and takes the demand *cum onere*.— *Skinner v. Smith.*

DOCKET— Police Justice. — A police justice cannot legalize his otherwise illegal acts by adding or inserting matter into the docket after the cause has left him by appeal. If the transcript of his docket be incorrect, he may only correct it by an amended or supplemental transcript. Section 6347 R. S. 1889, concerning amendments, does not apply to a prosecution for violation of a city ordinance, in municipal courts, unless special provision is made therefor.—*City of Stanberry v. Proctor.*

DRAM-SHOP KEEPER — Minor — Evidence. — When a prosecution is commenced under section 4588, R. S. 1889, wherein the indictment or information, charges that the accused is a dram-shop keeper, the State must sustain the charge by showing him to be such, as defined in section 4569, R. S. 1889. The age of an alleged minor may be proved by witnesses first describing his appearance and then giving their opinion of his age.—*State v. Douglas.*

ELECTIONS — Canvassing Board. — Where a board of canvassers, to ascertain and determine the result of an election, on a proposition to enforce the statute to restrain domestic animals, instead of being composed of county clerk and two judges of the county court, or two justices of the peace, was composed of the county clerk, and "judges of the county court," who were three in number, it was not organized as required by section 4084, R. S. 1889, and the result of such election has not been legally ascertained.—*White v. Brim.*

INFANT MEDICAL SERVICES.—An infant is not liable on a note given during infancy for medical services rendered to him while an infant living with his mother.—*Tharp v. Counley.*

LANDLORD'S LIEN — Notice. — It is not necessary to prove that a party who, within the period of the landlord's lien, purchases a crop grown on the leased premises, had direct notice or knowledge of the lien, if it can be shown that he knew the crop was grown on plaintiff's farm and that his vendor was plaintiff's tenant. This is enough to put him on inquiry, and is substantial notice of the existence of the lien.—*Dorson v. Caffey.*

MARITAL RIGHTS OF HUSBAND — Forcible Entry and Detainer.—Section 1999, R. S. 1889, did not in any way impair the husband's right to possession and enjoyment of lands in right of his wife. Such rights can only be divested for the causes and in the mode therein specified. In the action of forcible entry and detainer the only question is, has there been a forcible entry on plaintiff's possession. Neither the title nor the right to possession is in issue.—*Meriwether v. Howe.*

MECHANIC'S LIEN—Itemized Account.—The lien paper showed an account headed "Kansas City, ——, '88," itemized, with the day and month of each item: *Held*, sufficiently itemized and dated to render it a just and true account. Section 6709, R. S. 1889, sets out all that should be stated in the lien paper. Other matters should be stated in the petition thereon.—*Bruce v. Hoos.*

MISTAKES OF FACTS. — It is not every mistake of fact that justifies a recovery of money paid by reason thereof. The right to such recovery exists only where the mistake amounts to a destruction of the consideration. It does not exist where defendant has an equitable lien on the money.—*Ashley v. Jennings.*

REPLEVIN—Motion for a New Trial.—A party who has prepaid all freight charges and holds a receipted bill of lading, is entitled to possession of property at point of delivery, and to retain bill of lading so long as defendant refused to surrender property. The alleged agreement or custom to pay car rental to a third party is a matter between plaintiff and such third party. A motion which asks a new trial, "because the court admitted improper and incompetent testimony on the part of the plaintiff," is not such a specification as will advise the trial court of its error as contemplated by section 2085, R. S. 1889.—*Shockley v. K. C. Ft. S. & M. Ry. Co.*

STATUTE OF LIMITATIONS. — If the statute of limitations of the State in which a cause of action arose is one of extinguishment, the *lex loci* controls the action on such cause in this State. If the statute of such other State is one of repose only the *lex fori* applies.—*Morgan v. The Met. St. Ry. Co.*

STREET RAILWAY — Passenger's Rigts. — A street car company is not liable in damages to a passenger from whom a conductor, under a written rule of the company, requiring conductors to collect fare in money, or by "proper transfer check," refuses to receive a check which had become torn into two pieces before it was presented to him: *Held*, the rule of the company was a reasonable one, and should have been admitted in evidence. The right of a passenger to carriage will avail him nothing, unless he can produce to the conductor proper evidence of his right. The torn check was not such evidence.—*Woods v. The Met. St. Ry. Co.*

TRIAL COURT— Discretion. — An appellate court will not review the action of a lower court in declining to set aside its judgment and award a new trial, unless a strong case is made out showing a palpable abuse of a sound discretion, and where the injustice complained of is not traceable to the negligence of the party asking relief.—*Frick Co. v. Cafery.*

TRUSTEE—Duty.—If the trustee has reason to believe that the bid of a purchaser at sale under deed of trust is not made *bona fide*, it is his duty to take certain precautions. The law does not cast upon a trustee an extraordinary duty, nor demand extraordinary care. If he exercises care, and judgment of an ordinary, prudent business man, in his own affairs, he will not be chargeable for mere errors in judgment.—*Harkness v. Scammon.*